Supreme Court, U.S.
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No.

In The

United States Supreme Court

PROFESSOR RAJANI KANTH
PRO SE Petitioner/Appellant

ON WRIT OF CERTIORARI TO THE US TENTH CIRCUIT COURT OF APPEALS IN HAGUE CONVENTION INTERNATIONAL CHILD ABDUCTION CASE

Vs.

CORY KANTH
Respondent / Appellee

PETITION REQUESTING WRIT OF CERTIORARI IN HAGUE CONVENTION INTERNATIONAL CHILD ABDUCTION CASE

PETITION FOR WRIT OF CERTIORARI

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207 pp

QUESTIONS PRESENTED

1. Whether the Utah District Court and the Tenth Circuit Court erroneously determined that the United States, rather than Australia, was the applicable *'Habitual Residence'* of the Petitioner's family, when they applied the Hague Convention Against International Child Abduction Law to the Facts of this Case.
2. Whether the Utah District Court and the Tenth Circuit erroneously ruled in this Case, contravening due process, without exploring the Facts through a Hearing, and without Examination of the Evidence and Briefs presented by the Petitioner, and without allowing time to Petitioner to secure proper representation by Counsel.
3. Whether the Circuit Court should have Stayed Utah State Court proceedings, during the Course of the Appeal, when requested, as required under the Hague Convention , to ensure that a final determination regarding the Return of Abducted Children under the Hague Convention was entered, prior to the Utah State Court taking up Child Custody matters with respect to the abducted children.
4. Whether the Utah Federal District Court erred, stepping outside its jurisdiction, when it consented to 'settling' a Hague Convention Child Abduction Case, in fact actually dismissing it, in favor of a Divorce and Custody Stipulation, in the absence of the Petitioner, requiring the latter to gratuitously 'win back', on a *Pro Se* basis, his Properly filed Hague Convention Case as an *entre* back into the protection of the Hague Convention.

LIST OF PARTIES:

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PETITION FOR WRIT OF CERTIORARI TO THE TENTH CIRCUIT COURT

The Petitioner, Professor Rajani Kanth. respectfully prays to Court to Issue a Writ of Certiorari to Review and Set Aside the Judgment and Opinion(s) of the Tenth Circuit Court in Denver.

OPINIONS BELOW

The Opinion of the Utah District Court (*APPENDIX C)* is Reported at 79 F. Supp.2d 1317
The Opinions of the Tenth Circuit Court are included in *APPENDICES , A, B, D & E*

BASIS FOR JURISDICTION

Petitioner respectfully submits that this Court has jurisdiction to review this matter pursuant to U.S.C. § 1254(1).
The United States District Court for the District of Utah dismissed Petitioner's Hague Convention Case on Dec 14th. 1999. Petitioner filed a timely Appeal to the United States Court of Appeals for the Tenth Circuit, which issued a Ruling on November 2, 2000 denying Petitioner's Appeal. Petitioner's timely petition for rehearing was denied by the United States Court of Appeals for the Tenth Circuit on Nov. 22, 2000.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Articles of the Hague Convention on the Civil Aspects of International Child Abduction (*APPENDIX I)*
The International Child Abduction Remedies Act , 42 USC 11601, Section 2. (b).3.(B).(*APPENDIX J*); also Sec.2.(b).4
The Fourteenth Amendment to the US Constitution
Article III, Sections 1 and 2. of the US Constitution.

STATEMENT OF THE CASE

Facts pertaining to the Kanth Family's Normal Residence in Australia:

Petitioner, a US academic sought and found employ, as a Visiting Professor, in Sydney, Australia, moving there with his family (wife and two very young daughters) in **June of 1997.** In the course of his stay there, his contract with the University of New South Wales was renewed, but on February 19, 1998, he received a *permanent* offer of employ from the University of Technology, Sydney, which he accepted. (*APPENDIX L*). In early Spring of **98** , however, his wife, the Respondent, was assaulted in a Sydney street and, to help her recuperate, the family took a short holiday in **April 98,** visiting Respondent's family at the latter's home in Salt Lake City.

At the end of their brief and refreshing holiday, the family returned to their residency in Sydney, Australia , confident in the knowledge of the *previously accepted permanent job offer* from the University of Technology, in **June of 98,** where they remained until the Respondent, with a long history of radical substance abuse and serious psychological disabilities; suddenly departed unannounced abducting the Petitioner's minor children on **March 25th, 1999**.

Facts pertaining to the Acclimitisation of the Kanth Children in Australia:

Upon their original arrival in Sydney, Australia, in **June of 97,** on resident Visas, the Kanth girls were only 4 and 2 and had never attended school., having spent the previous academic year in Denmark where Petitioner had held a Visiting Professorship. As such, Sydney was the very first school experience for the older child, Malini, who graduated from Kindergarten, and 1st grade, in two separate Sydney public schools, being well ahead in 2nd grade ((indeed being granted 'advanced standing' and placed in an accelerated learning group) before her residence in Australia was rudely terminated. She secured numerous , indeed weekly, competitive awards at her grade school for her remarkable academic abilities.

The younger child, Anjana, barely 2 years old, was part of church based play groups close to home as more appropriate to her age. The older child, barely 4 at the time of arrival in Sydney and but 6 when abducted, was involved in a range of curricular and extra-curricular activities: she took gymnastics classes, securing a diploma; took swimming lessons, at the University pool ; took part in a program of

Dramatic Arts at the prestigious National Academy of Dramatic Arts; took part in a children's theatre group; and took separate piano and ballet lessons (the last cut short almost at inception, after her very first lesson, by the abduction).

Their family life was both pleasant and bountiful (with no record of domestic discord) as appropriate to an academic family, with frequent academic and social visitors, students, colleagues, their families and their children, at dinner parties, birthday parties, and such. The children enjoyed the beaches, the museums, the zoo, and the relaxed and recreational lifestyle of Sydney (they had a home with a pool for part of their stay there). In effect, the children had lived in Sydney, as normal and ordinary residents, from June of 1997 to March of 1999, with the older child actually proud of her ability to near perfectly mimic the Australian accent.

Legal Proceedings Under the Hague Convention:

After the sudden and surreptitious abduction, on the part of a chronically unstable Respondent , Petitioner traveled to Utah to inquire as to the rationale for the abduction and the welfare of his abducted children. It became apparent that that the Respondent was under pressure from her family to disdain the marriage owing to the latter's religious and ethnic preferences. Petitioner then returned to Australia and filed a *Petition for Return* of his Abducted Children under the *Hague Convention on International Child Abduction* (*APPENDIX H*), on the **14th of May, 1999,** [and also instituted Custody Proceedings in the Family Court of New South Wales on the 3rd of June, 1999: *See APPENDIX M*], which was duly endorsed and forwarded to the US by the Commonwealth Government of Australia. **August 27th, 1999** was the date set for a Hearing in the District Court in Utah. Petitioner arrived there on the very day of the Hearing only to discover that his attorneys had been engaged in trying, without his knowledge or acquiescence, to 'settle' the case, on the lines of divorce and custody stipulations, apparently with the approval of the District Court . Petitioner strongly resisted the unauthorised *'settlement'* , and won his Case back after a lengthy *Pro Se* legal struggle, in the same Federal Court, on **October 18th , 1999** (*APPENDIX G*).

Thereafter, Petitioner's Hague Convention Case ***(#99-CV-532-C)***, argued *Pro Se* by the Petitioner, was dismissed by the Utah District

Court on ***December 14th, 1999***, without a requested Hearing (*APPENDIX C*) , after disallowing a request by Petitioner to be granted time to retain Counsel, and after also *excluding* his principal Petitioner's Brief from due and deserving consideration , putatively on grounds of late mail delivery, as recorded and represented in the Court docket, though it had been transmitted earlier by facsimile *in all appropriate timing* (*APPENDIX K*).

The primary basis for the Dismissal was the mistaken Argument of the Utah District Court pertaining to the putative *Intent* of the Petitioner with respect to residing in Australia *permanently. Ignoring the factual evidence of their nearly 2 year residence in Australia,* and the Petitioner's *permanent employment* there, and primarily on the basis of Petitioner's applications to US universities, Court concluded that *Australia was not the family's habitual residence [a Key Hague Convention Precept].*

In effect, the critical Hague Convention concept of *Habitual Residence* , a *finding of fact* under the Convention, was being *redefined: a)* in terms of *parental intentions subsequent to the fact of moving to a new country,* and b) in terms of *permanence*, both of which are serious and major errors of interpretation of Hague Convention protocols and Case Law (stated briefy: the Convention takes the *point of the view of the child, not the parent, and looks backwards , not forwards, in time).*

Petitioner next filed an Appeal to the Tenth Circuit Court in Denver ***(Case#99-4246)*** which handed down its judgment on ***November 2 , 2000*** (*APPENDIX A)* upholding the Judgment of the Utah Court, again denying a request for Oral Argument, and also Excluding Petitioner' s previously excluded Brief yet again from due consideration (this ruling was upheld again in the Circuit Court's denial of Petitioner's Request for an *En Banc Rehearing* on ***Nov 22, 2000****; APPENDIX B)* . In effect, Petitioner's case had been adjudicated *twice,* but each time with both his Petition and his right to a Hearing, (apart from the previously denied Right to Counsel) summarily denied.

Yet again, the primary legal argument of the Tenth Circuit , echoing the District Court, referred to *the absence of a 'permanent intent' to settle in Australia,* as putatively inferred by Court principally from Petitioner's post-Relocation correspondence with US universities. Parenthetically, it is necessary to point out that the local family Courts in Utah proceeded vigorously, all through the Hague process, on

custodial . visitation, and support matters, awarding Respondent almost her demands, granting her temporary custody (*see APPENDIX F*), and assessing all manner of sanctions against the Petitioner including an effective denial of visitation rights with the abductees , *even whilst Convention proceedings were still pending in Federal Courts* , against the specific prohibitions of the Hague Convention Articles (*APPENDIX I: See Article 16),* much as their enabling counterpart legislation in the US, the *ICARA (International Child Abduction Remedies Act: APPENDIX J*). The Tenth Circuit refused to Stay local proceedings in Utah, whilst the Appeal was pending, and also refused to grant a Hearing, despite Requests by the Petitioner *(APPENDICES D and E)*. In consequence, the carefully planned *Forum-shopping*, against which the Hague Convention was primarily instituted, had paid off, from the abducting Respondent's point of view, as obviously expected, handsomely.

THE ARGUMENT

Preamble: Hague Convention Judgments of the District and Circuit Courts

Petitioner's Case, under the applicable protocols of the *Hague Convention on International Child Abduction* , originally supported and brought forward to the US by the Commonwealth of Australia (*APPENDIX H*) , was dismissed by the Utah District Court on December 14, 1999 *(APPENDIX C*), and denied on Appeal by the Tenth Circuit Court of Appeals on Nov.02, 2000 (*APPENDIX A)* in Denver, which denied again , on Nov.22, 2000, a requested *En Banc Panel Rehearing* Petition (*APPENDIX B*). The *Rationale for this Request for a Review*, simple and ineluctable as they are solemn and significant, are clarified succinctly below.

A. GENERAL SIGNIFICANCE AND IMPORT OF ERRONEOUS RULINGS:

This Case concerns a ***Hague Convention International Child Abduction Case Appeal*** involving Critical Issues of proper interpretation, adjudication , and implementation of the ***Convention Articles*** (*APPENDICES I & J)* , carrying enormous import not just for the individual Petitioner but for *the cause of abandoned parents across the globe seeking relief through the only truly international*

means available - ***The Hague Convention*** - for the ultimate crime of impassioned thoughtlessness and cruelty : *the abduction of minor children,* in order to play the adult game of successful ***forum-shopping.*** Errors of judgment and mistaken inferences here carry the potential for becoming the intolerable *precedent setting windows of opportunity* for would be abductors forevermore frustrating the high intent, and noble resolve, of the Convention.
It is the only International Covenant of its kind the world has, arrived at after years of deliberation by distinguished jurists and policy makers from the world over, and its high intent and purpose cannot be thwarted , *procedurally and substantively,* as it has been in this Case, without courting *reciprocal disaster internationally;*

Stated simply, the Circuit Court Judgment, has, howsoever unwittingly, *effectively Rewritten the Hague Convention,* eroding its Intent, and undermining its accumulated Case Law Judgments, to forever favor the Child Abductor, threatening to permanently frustrate, thereby, a vital instrument of International Public Policy in the highly sensitive and significant area of *Child Abduction,* both in the US and across the world.
It would seem apparent , to this Petitioner, that, when Lower Courts elide the objective intent of international protocols, as duly ratified by the Congress of the United States, *and inappropriately legislate new meanings to accepted terms,* posing a risk to the effective implementation of public policy, the Supreme Court, in the interest of safeguarding *uniformity and reciprocity,* the fundamental axioms of international law, has to serve as *the Constitutionally prescribed Court of Last Correction.*

B. THE PROCEDURAL DEFAULT:
While the uninformed and *voluntarist* nature of the Circuit Court Judgment is the key issue in this Petition, equally significant and compelling, from a *Public Policy standpoint,* is the nature of the *integrity of the Hague Process* - honored essentially in the breach - visited upon this Petitioner: stated plainly, it was invidious and anomalous with unwarranted disabilities imposed upon *him* , the *petitioner* in a Hague Convention action (*i.e.*, the *victimised* Party to a Hague Convention litigation), from a Denial of Right to Counsel, to a Denial of an Oral Hearing, and to an explicit refusal to even Read,

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let alone evaluate and adjudicate, the very Brief and Documentary Evidence undergirding the principal Petition under adjudication. His personally *Re*scribed and *Re*formulated *PRIMARY HAGUE BRIEF* (*included as APPENDIX K),* and its Supportive Documentation, much as his Appellant Briefs were, by explicit admission of Court, never read (let alone evaluated, or even adjudicated) - only summarily, and wholly improperly, denied and dismissed, not once but twice. The Errors, both Procedural and Substantive, violating both Hague Protocols and the common constitutional safeguards of elementary due process, were, stated simply, legion. In effect, the Courts rendered a strikingly *Ex Parte* Judgment based solely on evidence proffered by the *Respondent* , no less, in a *Hague Convention Child Abduction Case*..

The Convention Articles , as comprehensively explained in the authoritative ***Elisa Perez-Vera Report***, key document of the Convention, demand *a substantive review, not legalistic finessing* , of a Hague Petition, with the benefit of doubt accruing to the Petitioner, and with the burden of defense *against* an Order Returning the Children necessarily, and *asymmetrically*, falling on the abducting Respondent; *the actual process in this Case, however, reversed that important emphasis decisively.*

Additionally, there can be no precedent, in the US, for a Federal Judge, within a Federal Court, to *de facto* preside over a 'divorce and custody' settlement (as proposed by renegade counsels in the absence of this Petitioner) as prelude to a *de jure* dismissal of a Hague Case, *in context of an on-going Hague Convention Case Child Abduction Case* (contrary to ***42 USC 11601. Sec 2. b.4***), and yet this is exactly what the Utah District Court did, until this Petitioner relinquished his Counsels, and won his Hague rights back , *by Refiling the Case and prevailing solely on the merits of his own Brief and Argument (SEE APPENDIX G)* . And yet this should never have happened in the first place. In effect, Petitioner had been burdened, at the very outset, with a *gratuitous legal battle* simply to secure his Hague Convention rights. Furthermore, a Federal judge, in clear, and self- acknowledged, unfamiliarity with Hague Convention Protocols, nonetheless sat in Final Judgment on this Petitioner's Hague Case; in process, a *Pro Se* Hague Petitioner was severely burdened (forced to personally travel and depose, at his own expense, in Utah, though he was resident elsewhere*); his Motions left unread, or summarily dismissed; and his Case ignored, and rejected, in toto* . And the Circuit Court Panel, far

from comprehensively reviewing the Petitioner's Case for Appeal, on its factual and legal merits , simply echoed the District Court's Errors and Omissions of procedure and judgment almost *tout a fait.*
The Tenth Circuit refused to Stay local proceedings in Utah whilst the Appeal was *sub-judice*, contrary to ***Article 16*** of the Convention, thereby placing the Petitioner in *double jeopardy* as the local Courts moved swiftly to grant the Abductor- Respondent *temporary custody* , assessing all manner of damages against this Hague Convention Child Abduction Petitioner, and blocking his rights of access to his own abducted children
Both the District Court and the Circuit Court , thereby, disregarded the Petitioner's Constitutionally guaranteed Due Process Rights *(*as laid out in the *Fourteenth Amendment to the US Constitution*), and applicable Hague Convention Guidelines, as they pertained to the Adjudication Process in a Case properly brought forward under the protection of both US and International Covenants.
The Courts are the traditionally jealous Custodians of such *Rights to Process* , as the grand history of US judicial policy amply reveals; it were a shame to traduce that honorable tradition by allowing to let stand, without proper review, *an ill-considered Judgment that capped a similarly ill-endowed legal process* that altogether *Excluded* this Petitioner, a US citizen, albeit a *Resident of Australia* at the time of the Wrongful Removal of his children, effectively from ALL the means of defending his own Case involving the vital interests of his abducted and abused minor children.
Matters are placed in clear perspective *if the shoe were to be on the other foot; i.e. if a hypothetical Foreign Court were to treat a US Petitioner similarly, in reciprocating unfairness and iniquity, by a refusal to honor the Hague Treaty protocols, and, in sum, refusing to Return children abducted from the US.*, as is quite conceivable now, after the Tenth Circuit judgment. An International Treaty, to state the moral, is only as good as the Standards of Compliance set by the Signatory Nations.

C. THE SUBSTANTIVE DEFAULT:

The Substantive Basis of the Circuit Judgment , echoing as it does the District Court Ruling, is not only mistaken in its own understanding of key Hague Convention terms , *in Three Critical and Vital Regards*, but also flies in the face of the burden of received US, and Convention related, judicial wisdom as embodied in benchmark Circuit

Circuit Judgments and Expert Legal Opinion, that have thus far governed applications within this area of Law.

I. *Habitual Residence and Post-Factum 'Intentions':*

In the ***First Instance***, the Tenth Circuit, following the District Court (indeed almost the entire text of the Judgment of the District Court is run through with this sole, if mistaken, prepossession of examining the *'Intent'* of the Petitioner *after* taking up his new residence in Australia), defines the key Hague Concept of '*Habitual Residence*' (*a finding of fact*, under the Convention) in terms of the *Post-Factum Intentionality* of one parent *after* taking up a new residence (i.e. with respect to parental intent *vis a vis* the **Future**, *after the fact* of a consummated move to a new location) in a new environs , rather than looking at the *child's lived experience*, i.e. the immediate **Past** , in the new location, along with the nature of the *A Priori Intent* of the parent *prior to the original move* to the new location.

Once located in a new environs , it is simply incontestable ***that it is from the Child's perspective*** that a Hague Case is argued. The District Court emphatically did the opposite, and was , astonishingly, upheld by the Circuit Court: indeed, this reference on ***p. 6*** of the District Court Judgment, ***para#026***, leaves no room for doubt on this matter:

> *..as far as Anjana could be seen as settled in Australia.....*the focus must be dictated by ***the perspective of her parents*** (emphasis supplied by the Petitioner).

The Circuit Court echoes this error when it boldly states , on ***para#3***, ***p. 2*** of its Judgment, that:

> *...**the conduct, intentions and agreements of the parents during the time preceding the abduction** are important factors to be considered* (emphasis supplied by Petitioner).

In so scaling in, and placing reliance on, wholly irrelevant *Parental Post-Factum motivations*, after the fact of the move to a new environs, as opposed to the *physical , and cultural, lived experience* of the children in their new habitat, and the *A Priori Intent* of the Kanths in moving to Australia (which remains totally ignored in the judgments), the judgments referred to are profoundly *out of accord* with the burden of US, and International, Hague Judgments and Case Law in this Area,

and the primary thrust of the Articles and Documents of the Hague Convention. The Judgment of the Tenth Circuit Court clashes with the explicit ruling in the Landmark Opinion of ***FRIEDRICH II*** *(78F. 3d 1060, 1068, 1996)*, perhaps the most cited of all Hague Cases, *which summarily rejects this parental emphasis:*

> *To determine habitual residence the* ***court must focus on the child, not the Parents and examine past experience, not future intentions.*** (emphasis supplied by the Petitioner)

This is correctly echoed by the ***Third Circuit,*** in the other *Benchmark* Hague Convention Case of ***FEDER*** *(63, F.3d at 224, 1995).* To Cite:

> *That Mrs. Feder did not intend to remain in Australia permanently...does not void the couple's settled purpose to live as a family in the place where Mr. Feder had found work.*

The Judgment in ***MOZES vs MOZES I*** *(DC California 1998, 19 F. Suppl. 2d.1108)* underscores and repeats the same point with respect not just to the ruling in ***FEDER*** *(op. cit)*, *but also the equally categorical Judgment of the* ***Sixth Circuit*** in ***FRIEDRICH II*** *(op.cit)*, and *the near canonical Judgment in* ***BATES*** *(UK:CA, 122/89, 1989):*

> *The Third Circuit in* ***Feder*** *"guided by the aims and spirit of the Convention and assisted by the tenets enunciated in* ***Friedrich vs Friedrich*** *and* ***Bates*** *"held that a child's habitual residence is the place where she has been physically present for an amount of time sufficient for acclimitization and which has a degree of "settled purpose"* ***from the child's perspective"*** (emphasis supplied by the Petitioner).

Indeed, ***FRIEDRICH II*** *(op. cit)* had, a long time ago, defined the matter *dispositively:*

> *Any future plans that Mr. Friedrich had for Thomas...are irrelevant to our inquiry...****habitual residence can be altered only by a change in geography and the passage of time, not by changes in parental affection and responsibility*** (emphasis supplied by Petitioner)

Similar is the *affirmative confirmation* of the principle at issue, as given in many other cases *that rely on this mainstream consensus*

such as, e.g., ***SHALIT vs SHALIT*** *(D.Alaska, 1998 Case# A98-328 CV (JWS), para. 010)* which approvingly cites the judgment of ***TOREN vs TOREN*** (F.Suppl. 2d. 1998 WL 756366) thus:

> *It does not matter that the US was not intended to be the children's permanent residence, nor that it was intended when they came here that they were to return to Israel in 2000. What may happen in* ***the future has little, if any,*** *relevance to whether the children have become so "settled" in their place of residence that it may fairly be described in the present,* ***but by reference to the past,*** *as their "habitual' residence.* ***The Court must look back in time, not forward*** (emphasis supplied by the Petitioner).

Finally, in ***BENSON vs BENSON,*** *(Skane County Admn. Court, Sweden, Section 114, No. 9748-98, 1998, para. 024-25)* the judgment reads:

> *..too rigorous demands cannot be made concerning the person's intentions for the future...thus it* ***need not be a permanent residency*** (emphasis supplied by Petitioner)

Other Cases that endorse and uphold *this received norm of interpretation*, and give vital and stadial support to the Case of the Petitioner, include ***TOREN vs TOREN*** *(op. cit)*, ***MOZES vs MOZES I*** (*op. cit*) and ***WALTON vs WALTON*** *(S. D. Mass. 1996, 925 F. Suppl. 453).* The principle is also found strongly affirmed in ***Expert Legal Opinion*** as well, as in the words of ***Katherine Hung***, in Article titled ***There is no Place like Home: Determining Habitual Residence: Feder vs. Evan Feder, 26, Georgia Journal of International and Comparative Law, 487, 1997 :***

> *Evidence that one would prefer to live elsewhere does not clearly demonstrate a lack of voluntariness* (emphasis supplied by Petitioner)

Suffice to say, *post-factum parental changes of heart* have no critical bearing on Habitual Residence as much as the empirical *facts of the childrens' residence* in a new environs. In effect, the Kanths had traveled to Australia twice, once on a *temporary* contract, the second

time on a *permanent* contract , thereby fulfilling the rational essence of the notion of *intentionality*, as it bears on the criteria of Habitual Residence.

II. *Habitual Residence and 'Permanent Residence':*

In the ***Second Instance***, as made clear in ***Footnote#2*** , on ***Page#7***, of the Utah District Court Judgment, endorsed by the Tenth Circuit , *Habitual Residence is erroneously confused with 'permanent residence'*.. To cite the Utah Court:

> *The evidence before the Court, as discussed below, leads the Court to the conclusion that Mrs. Kanth is correct when she states in her affidavit that neither she nor Mr. Kanth intended* ***to permanently settle in Australia*** (emphasis supplied by Petitioner*).*

This defies the clear conviction of definitive Hague Judgments , such as ***BATES*** (*op. cit.*), the Landmark Case that stands on par with ***FRIEDRICH II and FEDER*** in its authority, where the judgment cites the classic Opinion in ***R. vs BARNET*** *(London Borough Council: Ex Parte Nilish Shah, 1983 2 A.C. 309 at 314)* approvingly:

> *...(it is not necessary that) the propositus intends to stay where he is indefinitely. Indeed his purpose while settled may be for a limited period.* (emphasis supplied by Petitioner)

This view is also confirmed in the other representative Case *of* ***R vs BARNET*** *(op.cit. at 343) :*

> *I unhesitatingly subscribe to the view that "ordinary resident" refers to a man's abode in a particular place or country which he has adopted voluntarily and for settled purpose as part of the regular order of his life for the time being, whether of short or long duration.*

Categorical reaffirmation of this *definitive Hague articulation* is also available in ***BENNETT vs. S. AUSTRALIA*** *(No. AD 1168 of 1993)* where Judge Forbes puts it *in the Australian context* where Petitioner's Case originated:

> *And it is worth mentioning, I think, that for the purposes of the [Australian] Family Law Act 1975 (section 4)* ***"ordinarily resident" is defined as including "habitually resident"*** (emphasis supplied by Petitioner)

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To underline the point yet again, as in ***BENSON vs BENSON*** (*op. cit.*):

> (Habitual Residence*) need not be a permanent residency*
> (emphasis supplied by Petitioner).

This is found to be amply and unmistakably reconfirmed in key *Authoritative* Convention Documents such as the ***Elisa Perez-Vera Report*** *(op. cit)*, and widely referenced literature on the subject such as ***Dr. Eric Clive's , The Concept of Habitual Residence*** *(in The Judicial Review, Part 3, 1997).*
As such, *Habitual residence is simply Ordinary Residence,* as explicitly defined in ***R vs BARNET*** *(op. cit).* On the other hand, the cognate Factor of *adequate Temporality*, given the important attribute of '*Settled Intent*' [established unequivocally in the Case of the Petitioner by the Permanent Job Offer – *APPENDIX L*– from Sydney, accepted by him] , ranges variably, in Hague Case Law interpretations, from periods of but just ***One Day to Six Months*** (with the latter being accepted now as the *definitive threshold period of time*) , as illustrated in the chorus of Opinions rendered in ***ZENEL vs HADOW*** *(1993, SLT, 975)* ***BROOKE vs WILLIS*** *(S.D.N.Y. 1995, 907.F. Suppl.57),* ***and BENNET vs S. AUSTRALIA*** *(op. cit)), C vs S (A Minor, 1990 2 FLR 442) , et. al.*
In sum, the Kanths were under no Hague Convention statutory obligation to intend to live in Australia *permanently*; nonetheless, they had traveled to Australia not once but *twice*, and the second time – being a *Return* to their *Habitual Residence* , rather than a 'second visit', since all their personal furnishings had been left behind in Sydney - armed with a permanent contract. No discussion of their subjective, *subsequent intent* can gainsay the objective nature of the permanent contract that attracted them , voluntarily and freely, back to their continuing Australian residency.

III. HABITUAL RESIDENCE AND TEMPORALITY

Furthermore, ***as a Third Issue,*** of a *factual* nature (with which the notion of *habitual residency* is more concerned, *after* a relocation), the Courts, quite remarkably, ignored the empirically operative fact that there were *Two family visits* to Australia, the second **return** visit made on the firm basis of a permanent job offer, concentrating their attention, in effect, entirely on the *first visit* (which, while still entirely sufficient in its *'Settled Intent'* rationale from a Hague

perspective, was nonetheless made even *stronger* by the indisputable *intentionality* involved in the family's second return to, and sojourn in, Australia). The ***factual importance*** of the family's *Second Return visit* to Australia in ***June, 98***, having had several weeks of family vacation time to ponder their continued resolve to return, cannot be understated:. A family that went there not once, but Twice, returning in the second instance armed with a permanent job offer, *can hardly be seen as lacking purpose, determination, or, 'settled intentionality'*. Furthermore, and even more importantly, the Courts also ignored the *single most important* ***empirical parameter*** pertaining to the Kanth family's habitual residency in Australia : *i.e. their prolonged sojourn in Australia across three Calendar years* that would have overwhelmingly supported the Petitioner's Case, and instead focused on the *first* , and only one, of the *two* visits suggesting thereby a misleading penumbra of indecision and uncertainty. In fact, so much stress is placed on *post-factum intentions* that the factual, empirical issues of the family's and the childrens' *actual, settled , physical and cultural* residence in Australia, with which the Convention notion of *'habitual residence'* is properly concerned, are given but short shrift. Stated importantly, the key statutory requirements of the Hague notion of *habitual residence* of the Kanth family (free and voluntary *Residents of Australia from June 1997 through March 1999* , barring a brief vacation in between , when the Abduction abruptly cut short the sojourn of the children) are satisfied as much by their prolonged *Temporal Situation*, in Australia as by their demonstrated (*a priori*) *'Settled Intent'*, quite overabundantly . Given the Petitioner's employment, the family's length of stay , and the range of curricular and extra-curricular involvements of the older child, they were emphatically *Ordinarily, and hence Habitually, Resident in Australia* beyond the shadow of a doubt (somewhat more information on these Hague Issues is provided in *APPENDIX K*, op. cit).

Both the Federal Courts discounted these impeccable Hague Rationale vis a vis *habitual residence - a combination of a reasonable indication of settled (but a priori) parental intent and a threshold of temporality allowing for acclimitisation of children* - in favor of taking a wholly unprecedented stance of basing Habitual Residence on the *putative Intent* of the Petitioner (and demanding an intent of *permanency* of residence from it) , as supposedly *'revealed'*, moreover, in his applications to universities elsewhere, but well ***after*** his move to Australia, all the while ignoring important factual,

empirical details of the Kanth children's actual sojourn in Australia. *In this, they are making invidious and illegitimate legal history.* The US Courts need to ponder whether they now wish, thereby, to Rewrite , and Reinvent, the Hague Convention , but in the novel and unintended direction of eroding its Principal Intent - the Mandated Judicial Duty , of Signatory States, to Return Abducted Children (Article 12 of the Convention), given the novel exit to abductors offered by the redefinition, should they let this unprecedented restatement stand unchecked and uncorrected.

REASONS FOR GRANTING THE PETITION

It is apparent that the Judgments of the Utah Court and the Circuit Court may both be hoisted on the same petard: they were both seriously misconceived, based as they were on a plainly erroneous understanding of the Key Hague Convention concept of *Habitual Residence* as it pertains to: a) the Role, Place, and Significance of *Post-Relocational Parental Intentions* in a Hague Convention Case , b) the critical importance of the *empirical and cultural facts of residence* and acclimitisation on the part of the children, and, c) the issue of *'permanency'* of residence

The judgments go erratically against the grain of widely respected and universally cited US Circuit Court Rulings that have taken on, by now, a near canonical authority in the US, and abroad, within Convention Case Law. Aside from misinterpreting Hague Convention protocols, the Tenth Circuit unwittingly usurps a legislative function that is not its prerogative by inadvertently redefining the meaning of vital, and well-ordained terms such as *'Habitual Residence*" and *'Settled Intent*", and in a direction arguably antithetical to Convention intent.

This unilateral, precedent-setting , rewriting carries the very real and serious potential of making it easier for potential abductors to bypass the Convention, thereby entailing the risk of permanently nullifying the explicit aim of the Hague Convention by providing a significant legal bypass to would-be abductors in terms of a novel *' change of heart'* pleading that would now be canonized , by this Case, as a permanent escapé clause from the explicit judicial mandate to return abducted children which is the cornerstone of the Convention.

An International Treaty can only survive on the basis of uniformity of application. If each Circuit Court in the US were to impart its own definition to the Convention, as is apparently now becoming the trend [as reflected in the recent ruling in ***Mozes II*** - *F.3d.D.C. 9th Circuit, 2001. CV-98-56505* - that , unlike ***Mozes I*** *(op. cit)*. tries to depart from mainstream renditions of Habitual Residence and Settled Intent]. in the direction of deviating from, and relaxing the import of. the essential aim of the Convention , the 'restoration of the pre-abduction status quo' (as quoted in ***FRIEDRICH II,*** *op. cit)* , *it were only a matter of time when the Convention would no longer be applicable in the US.*

As such, the Tenth Circuit ruling is an *invitation to anarchy* in this field of law, inviting, in time, predictably *reciprocal* responses from the other Signatory nations of the rest of the world. with the unfortunate casualties being both the Convention itself , and the scores of victimised minor children forced into international play , annually, as hapless pawns by calculating and unscrupulous parents.

The economic and social trends of Globalisation extant today make for fluid transience in the residency of qualified individuals responding increasingly, and in larger numbers, to opportunity and need in international markets the world over; but these latter-day realities of a mobile society must not be allowed to abrogate , willy-nilly, the inviolate *rights to stability* of minor children innocently caught in the altered intent of a dissatisfied parent , as was clearly intended by the framers of the Hague Convention. Stated succinctly, discord in a marriage, after the fact of an agreed-upon relocation, should not be reason enough for a spouse to *forum-shop* his/her way back to a more hospitable jurisdiction hauling minor children, as either chattel or as bargaining chips.

In this respect, the Supreme Court could provide a valuable assist to public policy, in the US and abroad, if it were to provide a *uniform standard of evaluation* , but one that is respectful of Convention Intentions (involving a subtle combination of a definable *a priori* parental Intent and a threshold of *acclimitisation* time for the children, as described earlier) for the key Convention notion of *"habitual residence"*, that may then serve as a safeguard against both willful and inadvertent misinterpretation and redefinition.

That much is actually *indicated by the ICARA,(**42 USC 1601, Sec 2. b. 3. B***), when it calls explicitly for a "uniform international interpretation of the Convention". *Prima facie*, there is sufficient

warrant to believe that the mainstream standards in this regard (as already cited in this Petition), from which the Tenth Circuit judgment deviates drastically, are entirely adequate, appropriate, and consistent with Convention guidelines. As such, Court could do little better than emphatically uphold, reinforce, and standardize those very standards. At another remove, serious violations of the most elementary judicial procedural *ethics*, as they pertain to the domain of *due process rights in litigation*, protected in general by the US Constitution ,and protected specifically also by the ICARA (*42 USC 11601.et.seq)* within a Hague context, are also at issue here given that Petitioner's Brief was excluded on (specious) technical grounds, a requested Hearing was disallowed, and a request for time to find Counsel was denied. As such, it is Petitioner's contention that his Case was never really adjudicated, only dismissed; and, more so, dismissed in favor of a child abductor, and in conflict with the burden of Hague Case Law. Even where misinterpretation may not be the issue, there is enough gray area in the Application of the Hague Convention, particularly in the federalist US, with its parallel and competing jurisdictions, to invite confusion even on the part of the most sagacious judicial authorities. It is unclear, for instance, exactly *when* a Hague Petitioner's legal recourse, under the Convention, ceases to apply such that local courts can go forward with their business determining custodial issues. The Tenth Circuit refused to Stay local proceedings, when requested, presumably on the presumption that the District Court dismissal of the Petition terminated the operation of **Article 16** of the Convention. It is Petitioner's conviction , on the other hand, *that unless all legal recourse is exhausted, including the Appellate process in full (subsuming also petitions to the Supreme Court) , the Convention continues to apply*, which would seem to fit the Convention intent better of securing *maximum substantive justice* for the left-behind spouse, who is at a radical disadvantage given the *'home court advantage'* of the Abductor-Respondent in a Hague Case. Again, the Supreme Court can lend a hand at clarification of such issues so that Hague Petitioners, victims already to begin with, may not be victimized yet again by jurisdictional confusion , competition, and conflict.

The *UCCJA* (*Uniform Child Custody Jurisdiction Act)* is a domestic attempt to establish uniform standards in the area of child custody, precisely because of wide variance in the practices of individual States; the Hague Convention on International Child Abduction is a

parallel attempt to legislate similarly enforceable and uniform guidelines for the world at large in the field of Child Abduction.. But the latter intent can hardly be realized, if, even within the limited sphere of just one sovereign nation, multiple and competing definitions, and diverging approaches to key parameters, are permitted to coexist uneasily , as is now the case with each Circuit Court defining Habitual Residence unilaterally, and according to its own lights.

CONCLUSION

In sum , it is Petitioner's contention that his Case was, thereby, as Wrongfully Adjudged as his own Briefs, Documents, and Participation, were Wrongfully Excluded. *En passant*, the heinous offense of international abduction of minor children, recognized now as the *newest form of Child Abuse* in the Global arena , was, in effect, condoned by the Tenth Circuit contrary to the explicit *raison d'etre* of the Hague Convention, and the legacy of landmark US Circuit Court judgments within it.

As such, Petitioner prays for an immediate and effective Redress of these Wrongs. This will not merely right his own personal wrongs, *but also restore the integrity of the Convention* (placed at risk by the Tenth Circuit Decision) and fulfil, as intended, the Treaty Obligations of the United States under the relevant Covenants of an important Agreement in International Law.

It is this Petitioner's contention that only the Supreme Court , unlike Lower Courts usually occupied with more parochial, domestic matters, may be expected to have both the Constitutional Stature, and the larger Judicial Interest , Responsibility, and Vision, as the highest Court in the land, to pay serious heed to the critical issue, fraught with enormous implications, of the *importance of US Compliance* , within a uniformly established and enforced framework of Reciprocity, with International Laws and Treaties , much as the basic Civic Rights issues of protection of due process guarantees to private citizens forced into litigation, as raised in this Case.

Given the foregoing, Petitioner, pleads for all due, and requisite, Relief.

Respectfully,

Professor Rajani Kanth **Singapore, February 19, 2001**
Pro Se Hague Convention Petitioner

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APPENDIX 'A'

Tenth Circuit Denial of Petitioner's Hague Appeal

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT
Tenth- Circuit

RAJANI K. KANTH, Petitioner-Appellant, Clerk v. COREY LEIGH KANTH, Respondent-Appellee.	(D.C. No. 99-CV-532-C) (D. Utah) 79 F. Supp. 2d 1317

ORDER AND JUDGMENT(*)

Before **BALDOCK, KELLY, and HENRY,** Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

This appeal is taken from an order of the district court denying petitioner's petition under the International Child Abduction Remedies Act, 42 U.S.C. §§ 11601-11610 (ICARA), and the Hague Convention on the Civil Aspects of International Child Abduction. The underlying facts are adequately outlined in the district court's decision. See Kanth v. Kanth, 79 F. Supp. 2d 1317 (D. Utah 1999).

The purpose of the Hague Convention is to secure the prompt return of children who have been wrongfully removed or retained in order that the court of the country in which the children habitually reside can make a custody determination. See id. at 1321. The petitioner is obligated to show, by a preponderance of the evidence, that the retention or removal is wrongful. See Shalit v. Coppe 182 F.3d 1124, 1128 (9th Cir. 1999) (citing 42 U.S.C. § 11603(e)(1)); In re Prevot, 59 F.3d 556, 560 (6th Cir. 1995) (same). A removal or retention is wrongful if it breaches a person's custody rights under the law of the state in which the child was habitually resident immediately prior to the removal or retention and at the time of the removal or retention those rights were actually exercised. See Lops v. Lops, 140 F.3d 927, 935 (11th Cir. 1998) (citing Article 3 of Hague Convention); Ohlander v. Larson, 114 F.3d 1531, 1534 (10th Cir. 1997) (same). The term "habitual residence" is not defined by either the Hague Convention, see Rydder v. Rydder, 49 F.3d 369, 373 (8th Cir. 1995), or the ICARA. See Prevot, 59 F.3d at 560. Rather a child's habitual residence is defined by examining specific facts and circumstances and is a term courts should not interpret technically or restrictively. See Zuker v. Andrews, 2 F. Supp. 2d 134, 136-37 (D. Mass. 1998), aff'd, 181 F.3d 81 (1st Cir- 1999) (table); see also Harkness v. Harkness, 577 N.W. 2d 116; 121 (Mich. Ct. App. 1998) ("determination of habitual residence' depends largely on the facts of the particular case"). Although it is the child's habitual residence that the court must determine, in the case of a young child(1) the conduct, intentions, and agreements of the parents during the time preceding the abduction are important factors to be considered. See Feder v. Evans-Feder, 63 F.3d 217, 223 (3d Cir. 1995); see also Pesin v. Osorio Rodriguez, 77 F. Supp. 2d 1277, 1285 (S-D. Fla. 1999) (court would focus on parents' actions and shared intentions where children were four and six at time of alleged wrongful retention). In addition

[T]here must be a degree of settled purpose. The purpose may be one or there may be several. It may be specific or general. All that the law requires is that there is a settled purpose. That is not to say that the propositus intends to stay where he is indefinitely. Indeed his purpose while settled may be for a limited period. Education, business or profession, employment, health, family or merely love of the place spring to mind as common reasons for a choice of regular abode, and there may well be many others. All that is necessary is that the purpose of living where one does has a sufficient degree of continuity to be properly described as settled.

Feder, 63 F.3d at 223 (quotation omitted).

The district court used these definitions along with an analysis of the children's circumstances and the parents' shared intentions regarding their children's presence in Australia in determining that their habitual residence before being taken to the United States in 1999 was not Australia. The district court's factual finding that Australia was not the habitual residence of the children is not clearly erroneous. See Harkness, 577 N.W. 2d at 124. Therefore the legal conclusion that their removal to Utah was not wrongful necessarily follows. See Osono Rodriguez, 77 F. Supp. 2d at 1286 (on finding that parents lacked shared intent that children stay in Florida, court concluded that Venezuela was habitual residence immediately before date that family had intended to depart Florida); Levesque v. Levesque, 816 F. Supp. 662, 665 (D. Kan. 1993) ("Removal or retention of a child can be wrongful only if the removal or retention is from the habitual residence of the child."); Meredith v. Meredith, 759 F. Supp. 1432, 1434-35 (D. Ariz. 1991) (same).

Our review of the record persuades us that the district court's determination was correct. Insofar as petitioner's

supplementary documentation in support of his opening brief was not before the district court, we have not considered it. Respondent's motion to file appellee's appendix is GRANTED. Any other outstanding motions are DENIED. Accordingly, for substantially the reasons stated in Kanth, 79 F. Supp. 2d 13 17, the judgment of the Unites States District Court for the District of Utah is AFFIRMED. The mandate shall issue forthwith.

Entered for the Court

Paul J. Kelly, Jr.

Circuit Judge

FOOTNOTES

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th CIT. R. 36.3.

1. At the time the Kanth children were removed from Australia by their mother and taken back to Utah, they were six and three years old.

APPENDIX 'B'

Tenth Circuit Denial of Petitioner's Plea For an 'En Banc' Rehearing

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

RAJANI K. KANTH, Petitioner - Appellant, v. COREY LEIGH KANTH, Respondent - Appellee.	**No. 99-4246**

ORDER
Filed November 22, 2000

Before **BALDOCK**, **KELLY**, and **HENRY** Circuit Judges.

Rojani Kanth's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service as required by Fed. R. App. P. 35. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court
PATRICK FISHER, Clerk of Court

by: Deputy Clerk

APPENDIX 'C'

Utah District Court Dismissal of Petitioner's Hague Petition

IN THE UNITED STATES
COURT FOR THE DISTRICT
OF
CENTRAL DIVISION

FILED
14 DEC 99 PM 2:02
DISTRICT OF UTAH
BY:

RAJANI K. KANTH, Plaintiff; ORDER vs. CORY LEIGH KANTH, Defendant.	Case No. 2:99CV532C

Mr. Kanth has filed this petition under the International Child Abduction Remedies Act, 42 U. S. C. § 11601-11610 ("ICARA"), and the Convention on the Civil Aspects of International Child Abduction, included in the Hague Convention adopted on October 25, 1980 ("the Hague Convention"). Mr. Kanth alleges that Mrs. Kanth wrongfully removed the children from Australia to the United States, and

that, under the Hague Convention, the children must be returned to Australia so that the courts of that country can determine custody. For the reasons stated below, Mr. Kanth's petition is denied.[1]

Background

Mr. and Mrs. Kanth and their two daughters are citizens of the United States. Mr. Kanth was born in India, but moved to the United States. He became a naturalized United States citizen in 1985. Mr. and Mrs. Kanth were married in Salt Lake City, Utah, in March 1990. Both of the Kanth daughters were born in

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[1]This matter was set for oral argument on December 9, 1999. However, Mr. Kanth, who now lives in New York, requested that oral argument be continued. Because the progress of this case has been slow, the court was reluctant to grant such a continuance. Mr. Kanth agreed that the court could resolve the matter on the basis of the written material, without oral argument. The court has now carefully considered the materials of the parties (those that were filed within the deadlines set by the court) and concludes that. oral argument would not assist the co in reaching a decision.

Salt Lake City: Malini Amstel Kanth in 1993 and Anjana Kesari Kanth in 1996.

Mr. Kanth is a college professor. In 1993, the University of Utah denied Mr. Kanth tenure. Although he made application to numerous universities, he was unable to find an acceptable position in the United States. In 1996, Mr. Kanth accepted a temporary academic position with the University of Aarhus in Denmark; he left the United States in June of that year. Mrs. Kanth and the children stayed in Salt Lake City until September 1996, when they joined Mr. Kanth in Denmark.

The Kanths did not stay long in Denmark. Mrs. Kanth and the children returned to Salt Lake City in April 1997; Mr. Kanth returned in September of that year. Following their return, Malini enrolled in a preschool in Salt Lake City. According to Mrs. Kanth, Malini made friends in the preschool and generally excelled.

Because Mr. Kanth was not able to locate an acceptable academic position in the United States, he again accepted a

teaching position in a foreign country, at the University of New South Wales, Australia. Mrs. Kanth opposed the move, consenting to go only when Mr. Kanth told her that the family's stay in Australia would last only six months.[2] The Kanth family traveled to Australia on temporary visas, arriving in July 1.997. They left behind most of their household furnishings and personal belongings, including many of the children's toys. These items were stored primarily with Mrs. Kanth's family in Salt Lake City. (See Cory Leigh Kanth Aff. Exhibits) (Photographs).

The Kanth family was in Australia for a total of nine months, from July 1997 to April 1998. While in Australia, Mr. Kanth continued to seek teaching positions in the United States. When his efforts were unsuccessful, he agreed to continue in his

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[2]Mr. and Mrs. Kanth disagree sharply over whether they intended that their stay in Australia would be permanent or temporary. The evidence before the court, as discussed below, leads the court to the conclusion that Mrs. Kanth is correct when she states in her affidavit that neither she nor Mr. Kanth intended to permanently settle in Australia.

teaching position at the University of New South Wales for six months. However, Mr. Kanth did not complete this second six-month term. He and his family returned to Salt Lake City in April 1998. When the family left Australia, they broke their lease on their apartment and forfeited a $1,120 rental bond.

Although Mrs. Kanth states that the family returned to the United States because Mr. Kanth had an interview at Franklin and Marshall College in Pennsylvania, a fact the court accepts as correct, two letters submitted to the court by Mrs. Kanth indicate that the family may have also left Australia as a result of Mr. Kanth's personal difficulties. The first letter is from Dr. Graham Voss, Associate Head of the School of Economics at the University of New South Wales. In the letter, Dr. Voss acknowledged that Mr. Kanth was resigning his "visiting position" as of April 2, 1998. Dr. Voss stated: "Again, let me express my sympathies with your difficulties and wish you and your family all the best in the future." (Cory Leigh Kanth Aff. Exs. at 193) (Letter from Voss to Kanth of 3/30/1998). The second

letter was sent by a counselor (the signature is illegible) from the Solution Focused Counselling Centre. The author obviously knew of problems Mr. Kanth was facing. The letter begins: "Thanks for the post card. Obviously you made it back to Utah and memories of Australia have hopefully faded a little." (Id. at 195) (Letter of 5/11/1998). After giving Mr. Kanth encouragement and advice about his mental and emotional state ("I am impressed that you have started work on controlling your `demons' "), the author concludes with the statement: "Hope you will be smiling more now that you are back in the States. Keep in touch." (Id.)

Back in Utah, the children apparently settled into the routine and practices they had had before the move to Australia. Malina returned to the same preschool. The children renewed their ties with Mrs. Kanth's family, with whom the children were very close. (Mrs. Kanth's family were the only relatives the children knew). The children were seen by Dr. Tom Metcalf, who had been their pediatrician since their births.

(The children were seen by several different doctors for illnesses in Australia).

Mr. Kanth accepted a temporary research fellowship at Harvard University, and pursued his interview opportunity in Pennsylvania. Mr. Kanth hoped that his Harvard fellowship would help him obtain a teaching position in the United States. Roger Owen of Harvard University wrote a letter of recommendation for Mr. Kanth. In his letter, Mr. Owen noted:

> Since leaving the University of Utah Rajani has led a somewhat peripatetic existence, teaching in Denmark and Australia and working on his general critique of Enlightenment thinking. He continues to be as productive of new ideas as ever. But he certainly needs somewhere to rest awhile if he is to exploit these new veins of thought to the full.

Id. at 020) (Letter from Owen to Kanth of 5/11/1998).

When Mr. Kanth did not find a teaching position in the United States, he accepted a three year position at the University of Technology ("UTS") in Sydney, Australia, and the Kanth Family left for a second stay in Australia in July 1998. Again, most of the family's furniture and personal belongings were left behind

in Salt Lake City.

Although Mr. Kanth contends that the family intended to stay in Australia, the evidence in the record does not support his contention. Mrs. Kanth states in her affidavit that they left reluctantly for Australia, and that Mr. Kanth had assured her they would return to the United States by autumn in 1998. Mr. Kanth believed that he would soon have a job with Duke University. Mrs. Kanth's statement that her husband anticipated that he would be receiving a job offer from Duke University is corroborated by an e-mail message, sent by Mr. Kanth to Mrs. Kanth's father, telling him of the family's address in Sydney and asking him to "send us any normal mail to the new address indicated above (this is important since DUKE UNIVERSITY will be writing to me at your address) OR you can open the mail and read it to see what it says and then call us (this is better for being much FASTER.)" (Id. at 056) (e-mail from Kanth to Meyer of 7/23/1998).

When the position at Duke University did not

materialize, Mr. Kanth continued to apply for other positions in the United States. In October 1998, Mr. Kanth wrote an application letter to Florida Atlantic University in which he declared:

> I am specially happy to be applying to Florida Atlantic for a suitable position in economics. Briefly, my current status is that I am in the running for a Chair in economics here at the UTS, having just returned from a visiting stint at Harvard. However, my sights are set elsewhere: for years now, I have been seeking to return to the US for professional and personal reasons (my family lives in Utah.)

(Id. at 021) (Letter from Kanth to Florida Atlantic University of 10/10/1998).

In a letter written to Mrs. Kanth's father in May 1999, Mr. Kanth makes clear his desire to find work in the United States:

> I am trying my best, as I have had for years, to find employment back in the US: in the very short run, this may or may not happen. But the long run prospects remain very high given the level of my productivity. It may happen as early as this Fall, or maybe a bit later.

(Id. at 032) (Letter from Kanth to Meyer of 5/5/1999).

According to Mrs. Kanth, Mr. Kanth feared that the time he spent as a lecturer at UTS, a business school, and not as a

professor at a nationally-ranked university, would damage his academic reputation and his future job opportunities. In fact, Mr. Kanth was apparently so dissatisfied with his positon at UTS, that he considered accepting a job at the National University of Singapore, when an offer was extended to him in January 1999. (Id. at 027) (Letter from National University of Singapore to Kanth of 1/29/1999).

During their second stay in Australia, the Kanth family again lived in rented apartments. According to Mrs. Kanth, the family lived in a total of seven different rented lodgings during their two stays in Australia.

Mr. and Mrs. Kanth disagree about the children's adjustment to their life in Australia. According to Mr. Kanth, the children enjoyed life in Australia and had friends and playmates there. Mrs. Kanth disputes this claim and goes into considerable detail about the loneliness her children experienced during both their stays in Australia. (Cory Leigh Kanth Aff. at 25-27.) The evidence is not clear on this question.

For example, Malini was a student at the Randwick School during the family's second stay, and her December 1998 report card from the school reflected that she was "a very capable child" and did well in her studies. (Cory Leigh Kanth Aff, Exs. at 143) (Student Progress Report). However, the teacher noted that Malini was "quite timid and reserved." (Id,). On the other hand, Malini's principal at the Randwick School, Peter Kensell, stated that "Socially, Malini had a number of close friends who enjoyed her company in the classroom and the playground." (Petitioner's Mem. Supp. Petition Ex. J) (Letter from Kensell to whom it may concern of 6/23/1999). Mr. Kanth also asserts that Malini engaged in various extracurricular activities while in Australia, such as piano lessons and ballet. However, there is nothing in the record that casts doubt upon Mrs. Kanth's statements that Malini attended these activities infrequently, going to only three piano lesson and one ballet lesson. (Cory Leigh Kanth Aff. at 26.)

Mr. Kanth has submitted several letters from

professional colleagues. For the most part, none of the letters are of particular assistance to the court because of their conclusory nature, lack of detail, and statements to the effect that Mr. and Mrs. Kanth enjoyed a warm, loving relationship. Such assessments cast doubt on the accuracy of the other statements made by the authors, because there is no question that the relationship between Mr. and Mrs. Kanth was deeply troubled and worsened during their stays in Australia, and by March 1999, the relationship between Mr. and Mrs. Kanth had deteriorated to the point that Mrs. Kanth returned to Salt Lake City with the children.

Discussion

The purpose of the Hague Convention is "to secure the prompt return of children wrongfully removed or retained" so that the courts of the country where the children habitually reside may make a determination of custody. Hague Convention, Art. 1.

To obtain relief under the Hague Convention, a petitioner has the burden of proving, by a preponderance of the evidence, that the children have been wrongfully removed or retained. See 42 U.S.C. § 11603(e)(1). A removal or retention is "wrongful" if:

> (a) it is in breach of rights of custody attributed to a person . . . under the law of the State in which the child was habitually resident immediately before the removal or retention; and
> (b) at the time of removal or retention those rights were actually exercised . . . .

Hague Convention, Art. 3.

The first question, then, is whether Australia was the habitual residence of the two Kanth daughters before Mrs. Kanth took them from Australia in March 1999. If the habitual residence of the children was not Australia, then there was no wrongful removal. See Ponath v. Ponath, 829 F. Supp. 363, 364 (D. Utah 1993) (internal citation omitted).

The term "habitual residence" is not defined in either the Hague Convention or ICARA. Courts have speculated that the

"'intent is for the concept [habitual residence] to remain fluid and fact based, without becoming rigid.'" Id. at 365 (quoting Levesque v. Levesque, 816 F. Supp. 662, 665 (D. Kan. 1993)).

The Third Circuit has discussed the concept of habitual residence in detail, noting that although it is the child's habitual residence that must be determined, in the case of a young child, "the conduct and the overtly stated intentions and agreements of the parents during the period preceding the act of abduction are bound to be important factors and it would be unrealistic to exclude them." Feder v. Evans-Feder, 63 F.3d 217, 223 (3d Cir. 1995). The court further explained:

> [T]here must be a degree of settled purpose. The purpose may be one or there may be several. It may be specific or general. All that the law requires is that there is a settled purpose. That is not to say that the propositus intends to stay where he is indefinitely. Indeed his purpose while settled may be for a limited period. Education, business or profession, employment, health, family or merely love of the place spring to mind as common reasons for a choice of regular abode, and there may well be many others. All that is necessary is that the purpose of living where one does has a sufficient degree of continuity to be properly described as settled.

Id. (citation omitted). The court determined that:

> a child's habitual residence is the place where he or she has been physically present for an amount of time sufficient for acclimatization which has a degree of "settled purpose" from the child's perspective. We further believe that a determination of whether any particular place satisfies this standard must focus on the child and consists of an analysis of the child's circumstances in that place and the parents' present, shared intentions regarding their child's presence there.

Id. at 224.

When the above definitions are applied to the facts here, it is evident that the habitual residence of the Kanth daughters immediately before being taken to the United States in March 1999 was not Australia but the United States. In March 1999, Malina was almost six years old, Anjana three. They had spent nine months in Australia on their first stay, and approximately the same amount of time on their second. Although Malina had attended school in Australia, the evidence suggests that she may have had difficulty finding friends in school and felt isolated. And as far as whether Anjana could be seen as settled

in Australia, due to her young age, the focus must be dictated by the perspective of her parents.

Also significant, and evidence that the children would not have been "acclimatized" to their life in Australia and would not have felt "settled" in their Australian surroundings, is the fact that the family lived in a succession of rented dwellings. Adding to the unfamiliarity of the children's surroundings, the rented accommodations in which they were living were not furnished with the family's own belongings. The photographs submitted by Mrs. Kanth show that much of the family's furniture and personal belongings were stored while the family was in Australia. The stored belongings include such items as Malini's rocking chair, the children's chest and toy cupboard, the children's yard furniture, and Malini's bicycle and Anjana's tricycle. Such items are the kind that children rely on to give them a sense of home and belonging, and the Kanth children did not have these familiar belongings with them when they were in Australia.

The evidence is also overwhelming the children's parents believed that their two stays in Australia would be temporary, and brief. Mrs. Kanth adamantly insists that she went to Australia reluctantly, relying on her husband's assurance that the family would quickly return to the United States. And Mr. Kanth's constant search for a teaching position in the United States, as shown by the numerous letters to and from colleges and universities in the United States, as well as his own words in his letter to Mrs. Kanth's father, undermines his present assertion that it was the family's intention to remain in Australia.

In sum, Mr. Kanth has failed to show that Australia was the habitual residence of the children and, accordingly, his petition is DENIED.

SO ORDERED this 14 day of December, 1999.

BY THE COURT: Tena Campbell

TENA CAMPBELL
United States District Judge

ce

United States District Court for the

District of Utah
December 14, 1999

** MAILING CERTIFICATE OF CLERK **

Re: 2:99 -cv-00532

True and correct copies of the attached were mailed by the clerk to the following:

Rajani K. Kanth
WAGNER COLLEGE
SOCIAL SCIENCES
ONE CAMPUS DR
STATEN ISLAND, NY 10301
(718) 390-3100

Frederick N. Green, Esq.
GREEN & BERRY
10 EXCHANGE PLACE STE 622
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JFAX 9,3635658

Mr. Harold G. Christensen, Esq.
SNOW CHRISTENSEN & MARTINEAU
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SALT LAKE CITY, UT 84145-5000
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APPENDIX 'D'

Tenth Circuit Denial of a Request to Stay Local Utah Custody Proceedings

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

RAJANI K. KANTH, Petitioner-Appellant, v. COREY LEIGH KANTH, Respondent-Appellee,	No. 99-4246

ORDER
Filed January 19, 2000

Before **EBEL** and **MURPHY,** Circuit Judges.

Petitioner-appellant Rajani K. Kanth seeks an order of this court enjoining divorce proceedings in Utah state court during the pendency of his appeal from the district court's order denying his petition pursuant to the International Child Abduction Remedies Act, 42 U.S.C. §§ 11601-11610, and the Hague Convention on the Civil Aspects of International Child Abduction. In. order to obtain injunctive relief pending appeal, an appellant must show (1) that he will likely be successful on appeal; (2) that he will be irreparably harmed if the injunction is

not granted; (3) that the opposing party will not be harmed if the injunction is granted; and (4) that the public interest does not oppose granting the injunction.

See 10th Cir. R. 8.1.

Upon consideration of appellant's motion and the applicable law, this court concludes that he has failed to demonstrate satisfaction of the above standards. Accordingly, his motion for injunctive relief pending appeal is denied.

Entered for the Court
PATRICK FISHER, Clerk

By L. Bahyano
Deputy Clerk

APPENDIX 'E'

Tenth Circuit Denial of a Request for a Hearing

United States Court of Appeals for the Tenth Circuit
OFFICE OF THE CLERK
Byron White United States Courthouse
1823 Stout Street
Denver, Colorado 80257
(303)844-3157

Patrick J. Fisher, Jr.
Clerk of Court

Elisabeth A. Shumaker
Chief Deputy Clerk

April 13, 2000

Rajani K . Kanth
Copthorne Orchid Hotel
214, Dunearn Road
Singapore, 00000

Mr. Frederick N. Green
Green & Berry
10 Exchange Place
#622
Salt Lake City, UT 84111

Re: 99-4246, Kanth v. Kanth
Dist/Ag docket: 99-CV-532-C,

Dear Counsel:

This case has been referred to a three-judge panel to determine whether oral argument is necessary. After examination of the briefs and record on appeal, the panel is unanimously of the opinion that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G).

The court will submit the case on the briefs and record for final disposition.

Please contact this office if you have questions.

Sincerely,

PATRICK FISHER
Clerk

PF:jal

By: Deputy Clerk

APPENDIX 'F'

Utah Court Order Granting Temporary Custody to Respondent While Hague Appeal is Pending in the Tenth Circuit

GREEN & BERRY
FREDERICK N. GREEN (1240)
Attorneys for Petitioner
622 Newhouse Building
10 Exchange Place
Salt Lake City, Utah 84111
Telephone: (801) 363-5650

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

CORY LEIGH KANTH, Petitioner, vs. RAJANI KANNEPALLI KANTH Respondent.	**ORDER AND RECOMMENDATION** **Civil No. 994904256** **Judge Anne M. Sitrba** **Commissioner** **Thomas N. Arnett**

The above entitled matter came on regularly for hearing before the Honorable Commissioner Thomas N. Arnett on the 20th day of January, 2000 based upon the Petitioner's Order to Show Cause seeking various temporary relief. The Court also

considered the Respondent's motion for a stay of these proceedings or, in the alternative, their abatement pending the resolution of the Australian divorce action. Based upon the file including the Petitioner's affidavit, and the proffer of counsel, as well as argument, and the Court being fully advised, it is, hereby,

ORDERED, ADJUDGED AND DECREED as follows:

1. The Respondent's motion for stay of proceedings or their abatement is and is hereby denied for the following reasons:

a. The Petitioner is seeking temporary relief and not a final order by the Order to Show Cause and therefore this decision is not one "on the merits" and thereby contemplated by Article 16 of the Hague Convention.

b. The Respondent has not sought and the Court has not granted any stay in the Federal Court proceedings specifically a stay as to the dismissal of Mr. Kanth's petition in Federal Court.

c. This Court has jurisdiction over both of the parties inasmuch as they have conducted their marital relationship in Utah and Mr. Kanth was served with process in the State of Utah.

d. There is a need in this case for some temporary order governing the parties relationships between themselves and the children, and establishing support given the current circumstances.

2. The Petitioner is awarded the sole care, custody and control of the minor children of the parties subject to restricted visitation and the Respondent which would restrict the Respondent's exercise of visitation outside of Salt Lake County without appropriate safe cards including the entry of a "mirror order" entered by the jurisdiction wherever the Respondent may travel with the children. Any such visitation shall be "phased in" in a manner which serves the best interest of the children.

3. Commencing January 19, 2000 the Respondent shall pay the Petitioner as and for child support in the sum of $896 per

month.

4. Commencing January 19, 2000 the Respondent shall pay the Petitioner the sum of $2,000 per month as and for temporary alimony.

5. The financial payments and financial responsibility of the Respondent shall be governed by and paid according to the Utah Uniform Civil Liability for Support Act.

6. The Respondent shall maintain or acquire available health, medical, dental, and life insurance for the benefit of the parties and the children during the pendency of this action and the cost or expense for the premiums of the health insurance shall be borne according to the Utah Uniform Civil Liability for Support Act and the parties shall divide equally any non covered medical expenses as well as any work related child care expenses.

7. Based upon the Stipulation of the Petitioner the issue as to the retroactivity of this order shall be reserved for further hearing.

8. Given the fact that Mr. Kanth has not responded to the Order to Show Cause but, rather, relied solely upon his motion for stay, this order may be reviewed prospectively by the Court at such time as the Respondent seeks that review. This order shall be subject to further order of the Court.

9. The Petitioner may, likewise, revisit the issue of retroactivity as well as the other issues raised in the Order to Show Cause including, but not limited to temporary attorneys fees and costs.

10. Based upon the Stipulation of the Petitioner the Court's denial of the Respondent's motion for stay, which contemplates the Respondent's appearance in this action and the filing of a pleading in response to the Petition, shall not be deemed an act of "acquiesce" on the part of the

Respondent in connection with any Hague Convention proceedings.

DATED THIS 22nd day of March, 2000.

BY THE COURT:

HONORABLE ANNE M. STIRBA
DISTRICT COURT JUDGE

DATED THIS 17 day of March, 2000.

BY THE COURT:

HONORABLE THOMAS N. ARNETT
DISTRICT COURT COMMISSIONER

CERTIFICATE OF HAND DELIVERY

F6

I hereby certify that a full, true and correct copy of the above and foregoing **RECOMMENDATION AND ORDER** was placed in the United States mail at Salt Lake City,Utah, with first-class postage thereon fully prepaid, on the 29 day of January 2000 addressed as follows:

Lisa A. Jones
SCALLEY & READING
261 East 300 South, #200
Salt Lake City, Utah 84111

APPENDIX 'G'

Transcript of Hearing to Recapture Petitioner's Hague Case After it's Wrongful Dismissal by the Utah District Court

IN THE UNITED STATES DISTRICT COURT FOR THE

DISTRICT OF UTAH CENTRAL DIVISION

RAJANI K. KANTH PETITIONER, VS. CORY LEIGH KANTH, RESPONDENT,	CIVIL NO. 2:99-CV-532C SALT LAKE CITY, UTAH OCTOBER 18, 1999

TRANSCRIPT OF STATUS CONFERENCE
BEFORE THE HONORABLE TENA CAMPBELL
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFF:
RAJANI K KANTH (PRO SE)
WAGNER COLLEGE
SOCIAL SCIENCES
ONE CAMPUS DRIVE
STATEN ISLAND, NEW YORK 10301

FOR THE PLAINTIFF:
GREEN AND BERRY
BY: FREDERICK N. GREEN ESQ.

622 NEWHOUSE BUILDING
10 EXCHANGE PLACE
SALT LAKE CITY, UTAH 84111
(801) 363-5650

COURT REPORTER :

RAYMOND P. FENLON
350 SOUTH MAIN STREET, #242
SALT LAKE CITY, UTAH 84101
(801) 809-4634

PROCEEDINGS

OCTOBER 18, 1999

1:10 P.M.

THE COURT: GOOD AFTERNOON. WE'RE HERE IN THE MATTER OF KANTH V. KANTH, 99-CV-532, HERE- - REALLY I'M VIEWING THIS AS A STATUS CONFERENCE. REPRESENTING THE PLAINTIFF IS MR. RICK GREEN, AND I NOTE THE PRESENCE OF MS. COREY KANTH. THE DEFENSE IS REPRESENTING HIMSELF, MISTER - - AND MAKE SURE I PRONOUNCE THIS CORRECTLY– RAJANI– AM I SAYING THAT? RAJANI KANTH. ALL RIGHT.

I WANT THE PARTIES TO KNOW THAT FIRST IN MY MIND IS RECOGNITION - - AND I THINK I MADE THAT REAL CLEAR TO YOU AT THE AUGUST 24TH HEARING – THAT I HAVE HAD JUST THE SMALLEST BIT OF THIS CONTROVERSY. I HAVE THE JURISDICTION OVER

ONLY ONE QUESTION, AND THAT IS THE PETITION THAT WAS FILED BY MR. KANTH FOR THE RETURN OF HIS CHILDREN, AND I HAVE NO JURISDICTION OVER THE OTHER ISSUES THAT ARE IN THE SETTLEMENT AGREEMENT.

AND I THINK AS I MADE CLEAR AT THE HEARING WHEN YOU THOUGHT THAT THIS MATTER WAS RESOLVED, ALTHOUGH THE SETTLEMENT AGREEMENT WAS READ INTO THE RECORD, THAT REALLY HAS NOTHING TO DO WITH THE ISSUE THAT I HAVE. AND WITH THAT IN MIND, AS I REVIEWED THE TRANSCRIPT AND THE COURT DOCKET, THERE IS NOTHING IN ANY WAY THAT CLOSES THIS CASE. IN FACT, MY LAST WORDS ARE "THEN WHAT I WOULD ASK OF YOU, SINCE I UNDERSTAND YOUR NEED TO PUT IT" – THAT WAS THE SETTLEMENT– ON THE RECORD, BUT I WOULD ASK THAT YOU VERY

QUICKLY FILE THE AGREED DISMISSAL OF THE PETITION UNDER THE INTERNATIONAL CHILD ABDUCTION REMEDIES ACT BECAUSE THAT IS THE ONLY MATTER OVER WHICH I HAVE JURISDICTION, AND WILL MAKE SURE THAT IT IS FILED. ALL RIGHT."

AND OF COURSE FOR THE REASONS THAT ARE SET FORTH HERE, WHATEVER, THAT WAS NOT DONE. SO THE WAY THE CASE IS NOW BEFORE ME , THE PETITION IS NOT DISMISSED. IT IS STILL THERE. THE STATUS IS IT'S STILL THERE. AND AS FAR AS THE PLEADING BY MS. KANTH'S ATTORNEY ON THE SETTLEMENT AGREEMENT, MR GREEN, I JUST DON'T HAVE JURISDICTION OVER IT. THE SETTLEMENT AGREEMENT ARISES OUT OF THE STATE ISSUES, THE DOMESTIC MATTERS, AND I AS A FEDERAL COURT SIMPLY CANNOT AND DO NOT ADJUDICATE THOSE ISSUES, AND BECAUSE WHAT I HAVE IS JUST THE ONE

PART. IT'S STILL ON GOING. I HAVE JURISDICTION OVER IT, AND MY VIEW IS WE JUST SET DOWN A TIME FOR HEARING AND IF THERE'S ANY FURTHER BRIEFING. THAT'S WHAT I THINK.

MR. GREEN: WE ARE NOT ASKING THIS COURT TO ENTERTAIN ANYTHING AT ALL REGARDING THE STATES COURT ACTION. AND IF I WAS LESS THAT CLEAR THAN IN MY PLEADINGS, THEN I APOLOGIZE.

THE COURT: NO. NO NEED TO - - I JUST PROBABLY MISUNDERSTOOD.

MR. GREEN: I BELIEVE IT'S JUST THE OPPOSITE. I THINK THAT IT IS MR. KANTH WHO IS LINKING THE DISMISSAL OF THE HAGUE CONVENTION PETITION TO THE STATE COURT STIPULATION.

THE COURT: EXCEPT THERE IS NO DISMISSAL.

MR. GREEN: MY UNDERSTANDING WAS THAT IN GRANTING THIS HEARING, THE COURT WAS

TREATING THE ACCEPTANCE OF OUR STIPULATION TO DISMISS THE HAGUE CONVENTION PROCEEDING AS A RULE 60(B) MOTION.

THE COURT: AND I BELIEVE THAT I LED YOU IN THAT PATH. AND AS I LOOKED INTO THE FILE - - AND IM SORRY IF I DID - - I LOOKED AT THE OFFICIAL DOCKET, AND I LOOKED AT THE RECORD. AND ALTHOUGH CERTAINLY THERE WAS - - AND YOU'RE RIGHT, MR. GREEN, THERE WAS AN ORAL STIPULATION. THERE WAS NO ORDER OF FORMAL DISMISSAL. AND WITHOUT THAT, I THINK WERE I TO SAY THE PETITION WAS DISMISSED, AND IF THAT MATTER WERE APPEALED, WE'D BE HERE– BACK HERE SO FAST FROM THE TENTH CIRCUIT THAT OUR HEADS WOULD SWIM.

MR. GREEN: POSSIBLY. I HAVE TWO THOUGHTS ON THAT. NUMBER ONE, WE DID SUBMIT AN ORDER

APPROVED BY MR. KANTH'S ATTORNEY PRIOR TO HIS DISMISSAL, APPROVED BY MR. DIAZ, AND WHERE THAT IS HERE I DON'T KNOW, BUT IT WAS SUBMITTED TO HIM. I HAVE A PHOTO COPY IN MY FILE APPROVED BY MYSELF. HEATHER WHITE AND MR. DIAZ.

THE COURT: YOU KNOW, THINGS GET LOST HERE, BUT IT SURE DIDNT MAKE IT HERE. IT DIDN'T MAKE IT INTO OUR – IT DID NOT – NO. IT DIDN'T COME HERE.

MR. GREEN: I DON'T THINK MR. KANTH WOULD DENY THE FACT THAT THAT OCCURRED. IN FACT, HIS OWN FILINGS ACKNOWLEDGE THAT MR. DIAZ SIGNED THE DOCUMENT. HE CLAIMS THAT MR. DIAZ DID NOT HAVE AUTHORITY TO SIGN TO DOCUMENT.

THE COURT: OKAY. WELL–

MR. GREEN: AND WE DID THAT QUITE

PROMPTLY, WITHIN THE NEXT DAY FOLLOWING THE HEARING. I BELIEVE IT TOOK MR. DIAZ A WEEK OR SO TO SIGN IT, AND I'D BE HAPPY TO SUPPLY THE COURT WITH THAT ORDER.

SECONDLY UNDER THE STATE LAW, WHICH I THINK GOVERN THE SUBSTANTIVE ISSUES. IF NOT THE PRECIDURAL ISSUES IN THIS CASE, I WOULD REQUEST THE COURT GIVE ME AN OPPORTUNITY TO BRIEF THE LEGAL EFFECT ON THE COURT'S RULING ACCEPTANCE THE STIPULATION.

THE COURT: WELL, BEFORE I REALLY GOT TO THINKING ABOUT IT AND I BELIEVED THAT THERE WAS NO ORDER- AND I'LL LOOK AND SEE WHERE THAT IS. THINGS GET LOST HERE- BUT EVEN IF THERE HAD BEEN - IF THERE WAS, AND I HAVE NO DOUBT ABOIUT IT FROM WHAT YOU TELL ME, MR. GREEN, AN ORDER THAT WAS RECEIVED HERE AND

THAT YOU BELIEVED AND HAD REASON TO BELIEVE ENDED THIS MATTER, THEN WHERE I THINK WE WOULD BE LOOKING WOULD BE, SINCE IT ISN'T A FINAL JUDGEMENT OR IT'S MORE IN THE MOTION OF A 55(B), WE'D BE LOOKING AT IT FOR A GOOD CAUSE STANDARD. I THINK THAT'S WHAT WE'RE LOOKING AT.

AND I KNOW THAT YOU DISPUTE, AND YOU HAVE SOME VERY GOOD GROUNDS, YOU DISPUTE VERY ARDENTLY MR. KANTH'S STATEMENT THAT THERE WAS NO AUTHORITY. BUT IT SEEMS TO ME THAT IN THE EXCESS OF CAUTION, AND GIVEN THE WAY THAT THE COURTS ARE TREATING THESE PETITIONS, AND THE DESIRE OF COURTS TO SETTLE THESE ISSUES ON THE MERITS, THAT THE FAR WISER COURSE WOULD BE SIMPLY GO AHEAD AND HAVE THE HEARING THAT WE WERE ALL READY TO DO ON

AUGUST 24TH.

I MEAN, MR. GREEN, YOU'VE PUT TOGETHER A COMPREHENSIVE SET OF MATERIALS, AND I RECOGNIZE IT'S TAKEN YOU A TREMENDOUS AMOUNT OF TIME, AND ALL – AND ITS ALL MRS. KANTHS FAMILY AND AFFIDAVITS. ITS SEEMS TO ME THAT WE SHOULD JUST , FOR THAT SAKE OF ADJUDICATING ISSUES ON THE MERITS, JUST GO AHEAD AND DO IT. WOULD YOU SUFFER PREJUDICE, OTHER THAN THE INEVITABLE PREJUDICE OF ALL YOUR WITNESSES WOULD HAVE TO BE-CALLED, ETCETERA? ANYTHING SUBSTANTIAL THAT YOU WOULD SUFFER IN THE MATTER OF PREJUDICE?

MR. GREEN: I UNDERSTAND WHAT THE COURT IS SAYING, AND I APPRECIATE THAT. THAT IS SOMETHING THAT I THINK THE COURT ALONE CAN MAKE SAME JUDGEMENT ON THAT IS

DISCRETIONARY WITH THE COURT AS TO WHEATHER OR NOT THERE IS EXCUSABLE NEGLECT, WHETHER THERE IS A GOOD CAUSE STANDARD MET. AND I THINK THE COURT KNOWS EXACTLY WHAT WE ARE SAYING THERE. AND IF I UNDERSTAND WHAT THE COURT IS SAYING, IT IS THAT PERHAPS THIS CASE DESERVES ITS DAY IN COURT.

THE COURT: AND THAT'S WELL PUT. THAT'S EXACTLY WHAT IM SAYING.

MR. GREEN: AND I SYMPATHIZE WITH THE COURT'S FEELINGS. I'VE MADE THE ARGUMENT MANY TIMES MYSELF THAT THAT IS A VALUABLE AND AN IMPORTANT RIGHT. IT IS SIMPLY OUR FEELING THAT ONCE YOU ENTER A CONTRACTUAL ARRANGEMENT, THAT THIS WHOLE SYSTEMS OF COURTS AND AGREEMENTS AND STIPULATIONS WORKS VERY WELL AS LONG AS WE ABIDE BY

CURTAIN RULES. WE THOUGHT WE DID. AND I WON'T TAKE THE TIME TO BELABOR THAT ARGUMENT. I THINK THE COURT HAS IT BEFORE IT. AND IF THE COURT IS SIMPLY SAYING THAT, AGAIN, IN AN ABUNDANCE OF CAUTION TO LET THE MATTER NE HEARD AND HAVE MR. KANTH HIS DAY IN COURT, I UNDERSTAND THAT, AND I TRUST MY CLIENTS WILL AS WELL, YOUR HONOR.

THE COURT: AND, YOU KNOW IT NAY BE - - AND I DON'T KNOW, AND I OFFER NO OPINION OR ANYTHING – BUT AT THE OUTCOME OF THIS CASE, I DON'T KNOW, THERE MIGHT BE SOME ADJUSTMENT MADE THERE.

MR. GREEN: IF WE CAN RESERVE THAT ISSUE, YOUR HONOR, AND POSSIBLY EVEN RESERVE FOR PURPOSES OF EVIDENCE THE QUESTION OF THE BINDING NATURE OF THE AGREEMENT WE

REACHED, THAT COULD MITIGATE SOME OF MY DIFFICULTIES.

THERE IS ONE OTHER FORM OF PREJUDICE THAT WE SUFFER, YOUR HONOR. IT IS THE POSITION OF MR. KANTH THAT THE PENDENCY OF THIS CASE BEFORE YOUR HONOR STAYS ANY PROCEEDINGS IN THE STATE COURT, WHICH IS ONLY LOGICAL UNTIL WE DETERMINE JURISDICTION. THAT IS A SIGNIFICANT PROBLEM. WE ARE WITHOUT A CUSTODY ORDER. WE ARE WITHOUT A TEMPORARY ORDER. WE ARE WITHOUT ANY ORDER WHATSOEVER IN THE STATE COURT.

THE COURT: I'M READY TO MOVE FAST IF YOU ARE.

MR. GREEN: WELL, WE HAVE MOVED FAST, AND IT WILL BE- WE DID RESCHEDULE EVERYTHING, AS THE COURT WILL RECALL, FOR THE AUGUST 24TH OR 25TH

HEARING. AND WHAT THE COURT TOLD US AT THAT TIME IS THAT IT WOULD BE SOME TIME BEFORE COULD RESCHEDULE. I WOULD ASK THE COURT'S INDULGENCE, BECAUSE I AM PROBABLY INTO THE LAST WEEK OF NOVEMBER OR THE FIRST WEEK OF DECEMBER MYSELF ON CONFLICTS THAT WOULD BE SUBJECT TO THIS COURT'S CALENDAR, OF COURSE.

THE COURT: I COULD TAKE YOU EARLIER.

MR. GREEN: WHAT I'M SAYING IS I KNOW YOU COULD, AND I THINK IN THE BALANCE THAT THAT MIGHT EVEN WORK A GREATER PREJUDICE ON MY CLIENT OR OTHER CLIENTS. MY OTHER THINKING ON THE SUBJECT IS THAT IT MAY VERY WELL BE, YOUR HONOR, THAT THIS MATTER IS ENTIRELY MOOTED NOW. THE COURT WILL RECALL OUR ARGUMENT THAT MR. KANTH NOW RESIDES IN NEW YORK CITY; THAT BEFORE THIS MATTER WAS TO BE

HEARD IN AUGUST, HE HAD SIGNED A CONTRACT FOR ONE YEAR' EMPLOYMENT THERE, WHICH IS A LONGER PERIOD OF TIME THAT HE EVER SPENT IN AUSTRALIA. THE IMPORTANCE OF THAT IS THAT EVEN IF MR. KANTH IS CORRECT THAT JURISDICTION FOLLOWS THE PETITIONER, HIM IN THIS CASE, IF JURISDICTION BY WAY OF HABITUAL RESIDENCE FOLLOWED MR. KANTH, IT WOULD STILL LODGE IN UTAH, UNITED STATES, UNDER THAT SITUATION TO MY WAY OF THINKING, THAT PROBABLY IS THE MOST COMPELLING FACT HERE. NOT ONLY DOES HE NOT RESIDE HERE, AND FOR AN INDEFINITE PERIOD OF TIME, FOR AT LEAST A YEAR IF HE ABIDES BY HIS CONTRACT, BUT THE CREDIBILITY ISSUES AND NOT RAISING THAT WITH YOUR HONOR WHEN HE KNEW IT AND WE DID NOT.

THE COURT: ALL RIGHT, THANKS.

MR. GREEN: THANK YOU, YOUR HONOR.

THE COURT: MR. KANTH, WHERE ARE YOU LIVING NOW.

MR. KANTH: YOUR HONOR, I AM NOW CURRENTLY IN NEW YORK CITY, AND I THINK I MADE CLEAR IN MY REPLY–

THE COURT: IF YOU COULD COME FORWARD, SIR. WE CAN JUST HEAR YOU A LITTLE BETTER. THANKS.

MR. KANTH: YOUR HONOR, I CAME TO THIS COUNTRY TO PURSUE THE HAGUE CASE. I FOUND THAT GIVEN MY AUSTRALIAN SALARY–

THE COURT: IF YOU HAVE COULD JUST SPEAK–

MR. KANTH: I SIMPLY COULD NOT AFFORD TO PAY AMERICAN LAWYERS ON AN AUSTRALIAN SALARY, WHICH IS WHY I TOOK LEAVE FROM THE UNIVERSITY AND I SOUGHT A TEMPORARY POSITION, WHICH IS WHAT I HAVE CURRENTLY, PURELY WITH

A VIEW OF PURSING MY HAGUE CASE. AND I THINK I SUBMITTED A DOCUMENT IN MY REPLY. IT'S AND AUTHORITIVE OPINION ON THE HAGUE THAT SUGGESTS THAT MY TEMPORARY OR EVEN PERMANENT RESIDENCE ANYWHERE OUTSIDE AND AFTER THE DATE OF FILING OF THE HAGUE PETITION IS IMMATERIAL TO THE RETURN OF THE CHILDREN. THAT'S A DOCUMENT THAT SAYS THAT. BUT ALL I'M SAYING IS I'M HERE TEMPORARILY; AT THE MOMENT THE HAGUE CASE IS OVER, YOUR HONOR, I'LL BE BACK IN AUSTRALIA.

THE COURT: ALL RIGHT. WELL, I'M GOING TO GRANT MR. KANTHS MOTION TO PROCEED WITH THIS CASE. I FIND THAT GOOD CAUSE AND INTERESTS OF MAKING SURE THAT THESE IMPORTANT ISSUES ARE DECIDED ON THE MERIT WEIGH IN FAVOR OF DECIDING THIS CASE ON THE

MERITS AND HEARING THE EVIDENCE AND HEARING THE LEGAL ARGUMENTS.

TALKING ABOUT SCHEDULING, IS THERE SUCH A THING, MR. GREEN– AND I DON'T KNOW IF YOU KNOW, MR. KANTH – IS DISCOVERY EVER TAKEN IN THESE MATTERS BEFORE? I'M JUST WONDERING ABOUT THE ASSISTANCE THAT PERHAPS DEPOSITIONS WOULD GIVE US.

MR. GREEN: I JUST MADE A NOTE OF THAT, YOUR HONOR. THESE PROCEEDINGS–

I DIDN'T MEAN TO DISPLACE YOU, MR. KANTH, BY ALL MEANS.

THERE IS NO SET OF RULES THAT SUGGEST WE FOLLOW A DIFFERENT TIMETABLE OR A DIFFERENT SET OF RULES. WE HAVE PROPOUNDED DISCOVERY THAT HAS NOT BEEN RESPONDED TO. AS IT HAPPENS, WE SCHEDULED THIS HEARING IN FRONT

OF YOUR HONOR BECAUSE IT COINCIDED WITH MR. KANTH'S DEPOSITION SCHEDULED FOR TOMORROW. WE WOULD ASK LEAVE OF THIS COURT TO PROCEED WITH THAT, AS LONG AS WE HAVE MR. KANTH HERE.

THE COURT: THAT MAKES SENSE, MR. KANTH. AND IT SEEMS TO ME THAT ANY FACTUAL ISSUES THAT YOU CAN KIND OF MAKE CLEAR FOR ME, THAT I HAVE THE BENEFIT OF KNOWING BEFORE THE HEARING, THE BETTER I'M GOING TO BE PREPARED TO DECIDE THIS. SO YOU HAVE A DEPOSITION. I'D ASK YOU TO APPEAR. AND THEN THE RIGHT IS RECIPROCAL. YOU YOURSELF HAVE THE RIGHT TO GIVE DISCOVERY- MAKE DISCOVERY REQUESTS OF THE - MRS. KANTH, AND YOU KNOW THAT I'M SURE.

MR. KANTH: YOUR HONOR, I'D JUST LIKE TO HAVE CLARIFIED THE ISSUES OF WHAT A DEPOSITION ACTUALLY IS IN THE TERMS OF HAGUE,

BECAUSE AS FAR AS I KNOW--AND I HAVE RESEARCHED THE HAGUE MATTERS QUITE EXHAUSTIVELY – I HAVE NOT SEEN A REFERENCE TO THAT PARTICULAR TERM.

THE COURT: WHAT IT WILL BE, AND – WHAT IT WILL BE WILL BE THE QUESTIONING THAT WILL BE MADE OF YOU. QUESTIONS WILL BE ASKED AND YOU WILL GIVE ANSWERS. AND THEY WILL FOCUS -AND IT'S USUALLY NOT A NARROW FOCUS BECAUSE DISCOVERY IS A LOT BROADER THAN A TRIAL. AND THE ISSUE WOULD BE, I WOULD IMAGINE, YOUR RESIDENCE, YOUR HABITUAL RESIDENCE, ETCETERA. AND ALSO THERE ARE OTHER DEFENSES THAT MRS. KANTH RAISED IN HER RESPONSE TO YOUR PETITION CONCERNING PARENTING AND RELATIONSHIPS, AND I WOULD IMAGINE THEY WILL SOON BE GOTTEN INTO.

WHICH JUST BRINGS TO MY MIND, MR. KANTH - AND I RECOGNIZE ATTORNEYS ARE VERY EXPENSIVE, AND WELL WORTH THE MONEY - BUT YOU MIGHT WELL THINK ABOUT TRYING TO GET YOURSELF SOME LEGAL REPRESENTATION, JUST BECAUSE YOU NEED- MIGHT NEED SOME HELP IN DEALING WITH THOSE KINDS OF ISSUES, AND IT MIGHT BE OF GREAT ASSISTANCE TO YOU, PARTICULARLY SINCE YOU'RE NOT HERE EXCEPT ON LIMITED TIMES . SO THAT'S JUST A SUGGESTION I THROW OUT TO YOU.

MR. KANTH: THANK YOU.

THE COURT: OKAY.

MR. GREEN: ONE OTHER MATTER, YOUR HONOR. I HAVE LOCATED THE ORDER, MY PHOTO COPY ALBEIT, THAT I'D LIKE TO LODGE WITH YOUR CLERK, IF THAT IS ACCEPTABLE.

THE COURT: JUST GIVE IT TO ME AND LET ME SEE

IT, AND IM GOING TO FIND OUT WHERE THE ORIGINAL WENT.

MR. GREEN: I BELIEVE I RECEIVED THE ORDER FROM MR. DIAZ AFTER HE SIGNED IT, AND HENCE MADE THE PHOTOCOPY THAT YOU SEE, AND I PROBABLY SENT IT TO HEATHER WHITE AFTERWARDS. TO THE EXTENT THAT THAT HAS BEARING ON THIS MATTER, IT WILL SOON SHOW THAT IT WAS MAILED, I BELIEVE. TO MR. DIAZ ON THE 27TH.

WHEN AFTER THAT TIME WE RECEIVED IT BACK FROM HIM, I DON'T KNOW, BUT MY RECOLLECTION IT WAS ABOUT A WEEK. SO I SAY THAT ONLY TO LET THE COURT KNOW WE TRIED TO COMPLY, AND I THINK WE DID–

THE COURT: AND I TELL YOU WHAT. UNDOUBTEDLY ANY ERROR WAS OURS. SO I WILL

SIMPLY LODGE THIS, BUT WE'LL GO AHEAD.

YES, SIR, MR. KANTH.

MR. KANTH: COULD I MAKE ONE COMMENT ON THIS PARTICULAR DOCUMENT?

THE COURT: SURE.

MR. KANTH: I DISCHARGED MY COUNSEL ON THE VERY SAME DAY AFTER I FELT THAT THEY HADN'T FULFILLED THE TERMS OF OUR AGREEMENT. AND I PARTICULARLY INFORMED MR. DIAZ WHEN MR. HILTON HAD LEFT FOR CALIFORNIA THAT HE WAS NOT AUTHORIZED TO SIGN ANY DOCUMENT WITHOUT MY EXPLICIT PERMISSION, AND HE NONETHELESS WHEN AHEAD AND OBVIOUSLY DID ALL KINDS OF THINGS ON HIS OWN. I JUST WANT TO LET YOU KNOW THAT HE WAS NO LONGER MY COUNSEL ON THAT VERY

THE COURT: ALL RIGHT. AND I WILL SIMPLY

HAVE THAT LODGED. AND IT WILL BE - MR. KANTH, I DIDN'T SIGN IT.

MR. GREEN: MAY I REFLECT IN THE ORDER, YOUR HONOR, THAT THE MOTION IS GRANTED; THAT WE WILL SCHEDULE A TRIAL; THAT WE CAN CONTINUE WITH DISCOVERY, AND THAT THE ISSUE OF PREJUDICE TO MY CLIENT, FINANCIAL OR OTHERWISE, CAN BE RAISED AT TRIAL AND-

THE COURT: IT'S NOT EXACTLY A TRIAL, IS IT? IT'S JUST LIKE WE WERE READY TO GO ON THE LAST TIME.

MR. GREEN: AN EVIDENTIARY HEARING IS PROBABLY MORE ACCURATE, YOUR HONOR. AND THAT WE CAN INTRODUCE EVIDENCE REGARDING THE STIPULATION AND THE CONTRACT?

THE COURT: WELL, LET ME JUST SAY, MR. GREEN, THAT I AM NOT GOING TO HEAR AT THAT TIME THE

QUESTIONS OF - FRANKLY WHAT WE'RE TALKING ABOUT IS WHETHER MR. KANTH IS GOING TO HAVE TO PERHAPS PAY FOR THE ADDITIONAL COSTS OF CONTINUING THE HEARING.

MR. GREEN: VERY WELL.

THE COURT: ALL RIGHT. BECAUSE IT MAY BE THAT THAT WONT BE APPROPRIATE. AND WHAT - ORDINARILY HOW I TAKE CARE OF THESE IN OTHER CONTEXTS WOULD BE I WOULD HAVE A MOTION FILED FOLLOWING MY RESOLUTION OF THE ISSUES OF - ON THE PETITION- IN OTHER WORDS, WHERE WILL THE CHILDREN GO? AND THEN IF I FEEL THAT IT IS APPROPRIATE, I WILL ASK FOR A MOTION AND A MEMORANDUM AND AFFIDAVITS, AND THAT'S USUALLY THE BETTER WAY TO DO SO . LET'S KEEP OUR TIME ON THE HEARING TO THE QUESTIONS RAISED UNDER THE PETITION.

MR. GREEN: AND WILL WE CONTINUE WITH THE SAME SCHEDULING ORDER THAT WAS - EXCEPT FOR THE DATE - THAT THE COURT ALREADY ENTERED IN THIS CASE?

THE COURT: I CAN'T REMEMBER MUCH WHAT IT WAS .

MR. GREEN: THE ORDER BASICALLY DICTATED THE PROSSES, INDICATING THAT THE PARTIES WOULD SUBMIT DOCUMENTARY EVIDENCE AND AFFIDAVITS; THAT THE WITNESSES WOULD THEN BE PRESENT FOR CROSS - - EXAMINATION PURPOSES ONLY, WHICH I BELIEVE IS THE ONLY WAY WE'LL KEEP THIS WITHIN ANY REASONABLE TIME FRAME; AND THAT THE COURT WOULD RELAX STANDARDS OF ADMISSIBILITY BUT STILL WOULD REQUIRE SOME MINIMUL LEVEL OF AUTHENTICITY FOR THE EVIDENCE.

THE COURT: WELL, YEAH. IT SEEMS TO ME THAT THAT'S WISE, BUT DO WE NEED FURTHER BRIEFING?

MR GREEN: I DON'T BELIEVE SO. I THINK, YOUR HONOR, WE WERE PREPARED TO GO. WE HAD REQUESTED THE DEPOSITION, IN FACT HAD NOTICED TO MR KANTH'S DEPOSITION, AS WELL AS WRITTEN DISCOVERY, WHICH WAS IN DEFAULT AT THE TIME OF THE EARLIER TRIAL. I WOULD HOPE THAT THAT WOULD BE ANSWERED. BUT ASIDE FROM THAT, NO, I WOULD HOPE WE DON'T HAVE TO REINVENT THE WHEEL AND THAT WE CAN PROCEED ON WHAT'S BEFORE THE COURT NOW.

THE COURT: MR KANTH, DO YOU ANTICIPATE THAT YOU'LL NEED TO FILE ANYTHING FURTHER WITH ME, ANY MATERIALS, ANTHING ALONG THOSE LINES?

MR KANTH IF SO, YOUR HONOR, I'LL DO IT AS

FAST AS POSSIBLE

THE COURT: WELL, LET ME JUST INSTRUCT YOU. LET'S SET DOWN, FIRST OF ALL, THE DATE AND TIME FOR THE HEARING, AND THEN WELL WORK BACKWARDS.

YOU SAY, MR. GREEN YOU CANNOT DO ANYTHING UNTIL END OF NOVEMBER.

MR GREEN: END OF NOVEMBER, PROBABLY THE FIRST OWEEK OF DECEMBER WILL BE PRETTY FAIR TO SAY

THE COURT: AND YOU DON'T LIVE HERE, MR KANTH, SO WHAT'S YOUR SCHEDULE?

MR KANTH: YOUR HONOR, MY INSTITUTION IS PERFECTLY AWARE AS TO WHY I'M HERE AND THE CONDITIONS FOR WHY I'M HERE, SO ANYTIME I'M REQUIRED, I CAN MAKE IT.

THE CLERK: DECEMBER 6TH WE COULD DO IT IN

THE MORNING

THE COURT: DECEMBER 6TH IS THAT GOING TO WORK

MR GREEN: IN ALL LIKELIHOOD FOR ME, YOUR HONOR.

I BELIEVE THAT MY CLIENT HAS A CONFLICT ON THAT FIRST WEEK; IF WE COULD GO TO THE SECOND WEEK.

THE COURT: OKAY, WE'LL HAVE SOME TROUBLES IF WE GET BEYOND THAT I THINK.

ARE YOU FREE, MRS. THE 9TH OF DECEMBER?

MR KANTH: I COULD DO IT.

THE COURT: HOW ABOUT YOU, MRS KANTH? ARE YOU FREE? THAT'S THE SECOND WEEK.

MRS KANTH: YES

THE COURT: LET'S DO IT IN THE AFTERNOON, 2:45.

YES, SIR?

MR KANTH: YOUR HONOR, I JUST RECALL ONE SMALL MATERIAL FACT IN RELATION TO THE DEPOSITION THAT YOU HAVE FOR TOMORROW. THERE IS AN ATTORNEY THAT I'VE BEEN SPEAKING WITH, GIVEN THE POTENTIAL OF THE REINSTATEMENT OF THE HAGUE. HER NAME IS LISA JONES. AND SHE IS AWARE, BUT SHE IS OUT OF TOWN. I BELIEVE SHE'S BACK IN A COUPLE OF DAYS. I WOULD LIKE MR. GREEN TO WAIT. IF I'M TO HAVE AN ATTORNEY, I'D RATHER HAVE HER PRESENT DURING THESE DEPOSITIONS. AND IT WON'T BE MORE THAN A DAY OR TWO AS FAR AS I KNOW. SHE'S OUT FOR A SMALL VACATION.

THE COURT: WELL WHAT DO YOU SAY MR. GREEN?

MR. GREEN YOUR HONOR, I'VE TALKED TO MS. JONES. SHE SAID THAT SHE WOULD INDEED BE GONE. SHE DOES INDEED REPRESENT MR. KANTH IN THE

STATE COURT PROCEEDINGS. SHE WOULD SEND SOMEONE TO COVER THE DEPOSITION. I HAVE NO PROBLEM SETTING ANOTHER DATE IF MR. KANTH WISHES TO TRAVEL HERE FOR THAT DATE, BUT I WOULD WANT IT AT MY DISCRETION BECAUSE OF WHAT I JUST DESCRIBED, A VERY WHAT I THINK IS A DIFFICULT SCHEDULE.

THE COURT: BUT I WANT TO BE ABLE TO HAVE A COPY OF THAT TRANSCRIPT.

MR. GREEN: I'M SURE.

THE COURT: SO WHAT I'M GOING TO DO IS I'M GOING TO GRANT YOUR MOTION. HOWEVER, MR. KANTH, YOU MUST APPEAR WITHIN–

HOW MANY WEEKS ARE YOU SAYING YOU WANT TO HAVE IT, MR. GREEN? TWO WEEKS?

MR. GREEN: TWO WEEKS WOULD PROBABLY WORK, YES.

THE COURT: WITHIN A TWO WEEK PERIOD.

MR. GREEN: BARRING SOME OTHER AGREEMENT WITH COUNSEL, I WOULD SUGGEST.

THE COURT: BARRING ANOTHER AGREEMENT, AND IT WILL BE AT THE DISCRETION OF MR. GREEN.

MR. KANTH: THAT'S ALL RIGHT.

THE COURT: BUT I UNDERSTAND THAT WILL BE A GOOD FAITH DISCRETION.

MR. GREEN: THAT WOULD WORK FOR ME, YOUR HONOR.

THE COURT: THEN WHAT I'M GOING TO DO NOW THAT WE HAVE THIS DECEMBER 9TH ORDER - AND I WILL WRITE THIS DOWN LATER. I AM GOING TO TRACK.

AND IF YOU WOULDN'T MIND TAKING THESE NOTES FOR MS. JONES. YOU ARE TO FILE AN ADDITIONAL MEMO, IF YOU AND SHE CHOOSE,

WITHIN THREE WEEKS FROM TODAY, WHICH WOULD BE WHAT? NOVEMBER 8TH. IF YOU – AND WHAT YOU NEED TO DO, MR. KANTH, IS IF YOU HAVE EVIDENCE, ANY OTHER EVIDENCE OTHER THAN WHAT YOU'VE ALREADY FILED, SUCH AS AFFIDAVITS, YOU ATTACH IT TO THAT MEMORANDA, BECAUSE I WANT TO SHORTCUT THIS. IN OTHER WORDS, IF YOU'RE GOING TO HAVE A WITNESS, MAKE SURE THAT THAT WITNESS PUTS IN HER OR HIS DIRECT TESTIMONY THROUGH AN AFFIDAVIT BUT THEN IS HERE FOR CROSS-EXAMINATION.

THEN, MR. GREEN, TWO WEEKS FOR ANY OPPOSITION?

MR. GREEN: WE CAN COMPLY, YES, YOUR HONOR.

THE COURT: AND THAT WOULD BE WHAT THEN?

THE CLERK: NOVEMBER 22ND.

THE COURT: SO ON NOVEMBER 22ND ANY OPPOSITION. AGAIN, IF YOU FEEL, MR. GREEN, THAT YOU HAVE SUPPLEMENTAL AFFIDAVITS OR MATERIALS, IT MUST BE ATTACHED.

MR. GREEN: AND THE WITNESSES PRESENT, YOUR HONOR?

THE COURT: AND WITNESSES PRESENT. AND MR. KANTH, WHAT THAT MEANS IS THE WITNESSES WHO TESTIFY WILL ONLY TESTIFY IN CROSS-EXAMINATION TO BEGIN WITH AND THEN REDIRECT, BECAUSE I WILL HAVE READ WHAT THEY ARE TO SAY INITIALLY IN THE AFFIDAVIT FORM OR IN THE DEPOSITION FORM. THAT WAY WE CAN STREAMLINE THIS.

MR. KANTH: COULD I ASK A QUESTION?

THE COURT: SURE.

MR. KANTH: GIVEN THAT THE WITNESSES AND

THE NATURE OF THIS CASE ARE IN AUSTRALIA, IS IT REALLY A REQUIREMENT FOR THEM TO COME HERE?

THE COURT: NO. I WILL EXCUSE YOUR WITNESS, BUT I WANT YOU TO KNOW - THOSE THAT ARE IN AUSTRALIA. BUT I WANT YOU TO KNOW THAT THAT - THAT DOESN'T HELP YOUR CASE, BECAUSE THERE WILL BE QUESTIONS THAT WILL BE LEFT UNANSWERED. AND I REALIZE YOU'VE GOT THIS PROBLEM SO, YOU KNOW, YOUR AUSTRALIAN WITNESSES, ETCETERA, CERTAINLY DON'T BRING THEM HERE. THAT'S TOO EXPENSIVE. BUT IF THERE ARE QUESTIONS THAT ARE LEFT UNANSWERED. AND I DON'T KNOW HOW I'LL RULE ON THEM. THAT'S JUST A PRACTICAL PROBLEM.

MR. KANTH: MAY I RESEARCH SOME OF THIS TO SEE HOW FAR- THE HAGUE CONVENTION HAS TRIED MANY SUCH CASES. I'M SURE IN ALL SUCH CASE THE

PROBLEM ARISES OF ONE PARENT BEING IN A DIFFERENT COUNTRY.

THE COURT: ABSOLUTELY.

MR. KANTH: HOW WILL WITNESS PROCEDURES BE HANDLED.

THE COURT: ABSOLUTELY. YOU LOOK INTO THAT BUT BEAR IN MIND THAT AS A TRAIL COURT, I HAVE TO HAVE BELIEVABLE EVIDENCE, SOMETHING THAT I CAN EVALUATE, AND THAT'S GOT TO BE ONE OF THE CONSIDERATIONS. IN OTHER WORDS, TO BASE A DECISION ON FACTS, I'VE GOT TO HAVE A BASIS OF THE FACTS. I NEED TO SEE SOMETHING IN FRONT OF ME. AND IF THINGS – EVIDENCE IS TOO CONCLUSORY OR LEAVES HOLES, THEN THOSE HOLES REMAIN IS WHAT I'M SAYING.

MR. KANTH: SO AFFIDAVITS WILL NOT BE SUFFICIENT FOR THE PURPOSES OF THIS?

THE COURT: NO, I'M NOT SAYING THAT. WHAT I'M SAYING IS WHEN YOU HAVE WITNESSES WHO ARE OUT OF THE COUNTRY, AFFIDAVITS WILL HAVE TO BE SUFFICIENT, OKAY? BUT BEAR IN MIND THAT EVEN WITH THE BEST DRAFTED AFFIDAVIT, THERE WILL ALWAYS BE QUESTIONS. AND FOR THOSE OF YOUR WITNESSES WHO ARE LOCAL, WHO ARE HERE, YOU MUST HAVE THEM HERE FOR CROSS-EXAMINATION, BUT I RECOGNIZE OUT OF COUNTRY WITNESSES AND GOING TO BE ONLY BY AFFIDAVIT. OKAY?

MR. KANTH: THANK YOU.

THE COURT: ALL RIGHT. THEN-

MR. GREEN: ONE LAST ITEM, YOUR HONOR. IF MR. KANTH IS NOT GOING TO BE REPRESENTED BY MS. JONES, COULD WE BE NOTIFIED WITHIN SAY TEN DAYS?

THE COURT: YES, AND LET ME KNOW TOO. IF SHE'S GOING TO REPRESENT YOU IN THIS PROCEEDING, MR. KANTH, SHE HAS TO FILE THIS– IS SHE GOING TO BE BACK THIS WEEK?

MR. KANTH: APPARENTLY.

THE COURT: HAVE HER FILE A NOTICE OF APPEARANCE HERE SO THAT WE SEND THE PLEADINGS TO HER. SHE NEED TO BE ON OUR RECORDS. AND THEN AT THE SAME TIME NOTIFY MR. GREEN OF – IF SHE'S REPRESENTING YOU, SOMEONE ELSE, OR IF YOU YOURSELF.

MR. KANTH: I'LL LET THEM BOTH KNOW.

THE COURT: BECAUSE WE NEED TO KNOW WHO IS REPRESENTING WHOM.

ANYTHING ELSE?

MR. KANTH, HOW DO WE GET HOLD OF YOU IN CASE THERE ARE CHANGES AND THINGS? DO YOU

HAVE A LOCAL NUMBER?

MR. KANTH: I LEFT A PHONE NUMBER –

LOCALLY?

THE COURT: YES.

MR. KANTH: I'M AFRAID I'M GOING TO HAVE TO HEAD BACK, BUT I HAVE A PHONE NUMBER THAT I PASSED ON TO THE CLERK.

THE CLERK: I HAVE HIS NEW YORK NUMBER.

THE COURT: AND THEN IT WOULD BE GOOD IF YOU HAD MS. JONES OR OTHER LOCAL COUNSEL REPRESENTING YOU SO THAT WE HAVE SOMEONE THAT WE CAN GET IN TOUCH WITH QUICKLY.

MR. KANTH: IN FACT MS. JONES IS AVAILABLE.

MR. GREEN: THANK YOU, YOUR HONOR.

THE COURT: BUT SHE'S GOING TO – IF SHE IS; UNTIL THAT TIME, WE'RE GOING TO HAVE TO DIRECT CORRESPONDENCE TO NEW YORK.

MR. GREEN: IF MR. KANTH IS CONFIDENT THAT SHE'LL BE REPRESENTING HIM, I'LL AT LEAST COPY HER INTO THIS ORDER PERHAPS TO SAVE SOME TIME.

THE COURT: THAT'S RIGHT. I WILL – WHAT THAT MEANS, MR. KANTH, IS THE ORDER THAT I AM GOING TO PREPARE WILL GO TO MR. GREEN AND TO YOU. IT CAN'T GO FROM US TO MS. JONES BECAUSE SHE'S NOT YOUR ATTORNEY YET. MR. GREEN HAS OFFERED TO SEND IT.

MR. KANTH: I MUST TELL THE COURT I'M FAIRLY CONFIDENT SHE WILL BE. BUT I DON'T HAVE HER CONSENT YET.

THE COURT: MAKE SURE THEN THAT SHE ENTERS HER APPEARANCE.

(HEARING CONCLUDED AT 1:40 P.M.)

***

CERTIFICATE OF REPORTER

I, RAYMOND P. FELTON, OFFICIAL COURT REPORTER FOR THE UNITED STATES DISTRICT COURT, DISTRICT OF UTAH DO HEREBY CERTIFY THAT I REPORTED, IN MY OFFICIAL CAPACITY, THE PROCEEDINGS HAD UPON THE HEARING IN THE CASE OF KANTH VS. KANTH, CIVIL NO. 2:99-CV-532C, IN SAID COURT, ON THE 18TH DAY OF OCTOBER, 1999.

I FURTHER CERTIFY THAT THE FOREGOING PAGES CONSTITUTE THE OFFICIAL TRANSCRIPT OF SAID PROCEEDINGS AS TAKEN FROM MY SHORT HAND NOTES.

IN WITNESS WHEREOF, I HAVE HERETO SUBSCRIBE MY NAME THIS 21ST DAY OF OCTOBER, 1999.

APPENDIX 'H'

Petitioner's Australian Hague Convention Child Abduction Application and Affidavit

FORM I

COMMONWEALTH OF AUSTRALIA

Family Law (Child Abduction Convention) Regulations

APPLICATION IN ACCORDANCE WITH THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION FOR THE, RETURN OF A CHILD ABDUCTED FROM AUSTRALIA

REQUESTING CENTRAL AUTHORITY OR APPLICANT: The Secretary, Commonwealth Attorney General's Department	**REQUESTING AUTHORITY: NSW Department of Community Services, 164 Liverpool Road, Ashfield NSW, Australia**

Concerns the following children: Malini Amstel Kanth and Anjana Kesari Kanth

who will attain the ages of 16 on: 1 April 2009 and 20 February 2012

1. IDENTITY OF THE CHILD AND THE PARENTS ;

1.1 CHILD

Name and first names: Malini Amstel KANTH

Date of birth: 1 April 1993 .

Place of birth:	Salt Lake City. Utah, United States of America
Habitual residence:.	New South Wales, Australia
Passport No. or Identity Card No.	US Passport No. 0542 9912
Description and photo if possible:	Photo annexed

1.2 CHILD

Name and first names:	Anjana Kesari KANTH
Date of birth:	20 February 1996
Place of birth: States of America	Salt Lake City, Utah, United
Habitual residence: Australia	New South Wales,
Passport No. or Identity Card No.	US Passport No. 05452 9913
Description and photo if possible:	Photo annexed

2. PARENTS

2.1 Mother

Name and first names:	Cory Leigh KANTH

Date of birth:	8 September 1965
Place of birth:	Salt Lake City, Utah, United States of America
Nationality:	American Citizen
Occupation:	Homemaker
Habitual residence:	New South Wales, Australia
Passport No. or Identity Card No.:	US Passport No. 154507481

2.2 Father

Name and first names:	Rajani Kannepalli KANTH
Date of birth:	8 February 1949
Place of birth:	Madras, India
Nationality:	American Citizen
Occupation:	Professor
Habitual residence:	New South Wales, Australia

	Passport No. or Identity Card No., if any:	US Passport No: 054335271
2.3	Date and place of marriage:	Salt Lake City, Utah, United States of America in March 1992.

II REQUESTING INDIVIDUAL OR INSTITUTION:

3.	Name and first names:	Rajani Kannepalli KANTH
	Nationality of individual applicant:	American Citizen
	Occupation of individual applicant:	Professor
	Habitual residence:	32 High Street. Randwick, 2031, New South Wales, Australia
	Passport No. or Identity Card No, if any:	US Passport No. 054335271
	Relationship to the children:	Father
	Name and address of legal adviser, if any:	Not applicable

III PLACE WHERE THE CHILDREN ARE THOUGHT TO BE:

4.1 Information concerning the person alleged to have removed or retained the child.

Name and first names:	Cory Leigh KANTH
Date of birth:	8 September 1965
Nationality:	American Citizen .
Occupation:	Homemaker
Last known address:	2736 East 7305 South Salt Lake City, Utah, 84121, United States of America Tel: 801 733 9775
Passport No. or Identity Card No., if any:	US Passport No. 154507481
Description and photo:	Photo annexed

4.2 Address of children: 2736 East 7305 South Salt Lake City, Utah 84121, United States of America

4.3 Other persons who might be able to supply additional information relating to the whereabouts of the children:

Maternal Grandparents:	Marvin and Judy Meyer, 2736 East 7305 South Salt

Lake City, Utah, 84121,
United States of America

IV. TIME, PLACE, DATE AND CIRCUMSTANCES OF THE WRONGFUL RETENTION

The applicant father and the respondent mother were married in March 1992 in Salt Lake City, Utah, United States of America. On I April 1993 the child, Malini Amstel Kanth was born in Salt Lake City, Utah and the child, Anjana Kesari Kanth was born on 20 February 1996 in Salt Lake City, Utah.

Later in 1996 the father accepted an appointment as an academic in Denmark and the mother and children accompanied him to live in that country from 1996 to 1997. In June 1997 the father accepted an appointment as an academic at the University of New South Wales and the family traveled to Australia so that he could take up that position. It was the parents' intention to reside in Australia permanently.

The father later in 1997 transferred to the University of Technology Sydney where he is currently employed on a three year renewable contract which will expire in 2001. Between April and June 1999 the father and mother and the children returned to Salt Lake City, Utah for a holiday. The whole family carme back to Australia in June *1998 with* the intention of residing here permanently.

On 25 March 1999 the father returned home from work to find the mother and the children and their belongings missing. The mother had left a note stating that she loved the father and that she and the children would be living in their home in Utah. The father had no prior knowledge of his wifc's intention to leave Australia with the children and he did not consent to this and

has not since consented to their remaining in the United States of America.

The father believes that the mother and the children flew back to Salt Lake City. Utah on 25 March 1999. He has since had contact with the mother and knows that she and the children arc living with the matemal grandparents, Marvin and Judy Meyer at 2736 East 7305 South Salt Lake City, Utah.

V. FACTUAL OR LEGAL GROUNDS JUSTIFYING THE REQUEST

(1) The parties and the children were habitually resident in Australia at the time of the wrongful removal.

(2) The children have permission to reside in Australia as temporary residents until I July 2001

(3) There are currently no Court orders concerning custody of the children. In the absence of any such order, Sections 61B and 61C of the Family Law Act 1975 (a Federal Act) state that the applicant and the respondent have joint rights of custody over the children.

(4) The Applicant has had no contact with the respondent since a telephone conversation on 13 May 1999 or the children since a telephone conversation on 12 May 1999.

(5) The Applicant has at no time consented or subsequently acquiesced to the removal of the children to the United States of America or their retention there.

VII CHILDREN TO BE RETURNED TO:

(a) Name: Rajani Kannepalli KANTH
Date of Birth:

8 February 1949:

Place of Birth: Madras, India

Address: 32 High Street. Randwick
2031, New South Wales,
Australia

Telephone Number: 02 9399 3785 (Home)
02 9514 7734 (Work)

(b) PROPOSED ARRANGEMENTS FOR THE RETURN OF THE CHILDREN:

The applicant father would seek that the mother meet all requisite costs but failing this, he would be prepared to meet the costs himself.

VIII OTHER REMARKS

Nil

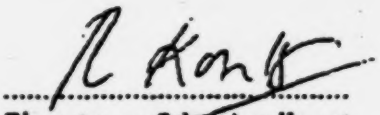
IX LIST OF DOCUMENTS ATTACHED

Annexure "A" - photograph of the children and the respondent
Annexure "B" - copy of birth certificate of Malini Amstel Kanth
Annexure "C" - copy of birth certificate of Anjana Kesari Kanth

I authorize the requested Central Authority and its agents to act on my behalf and to do all things reasonable and necessary in connection with this application.

DATED: 14 day of May 1999.

PLACE: Ashfield, New South Wales, Australia



Signature of the Applicant

COMMONWEALTH OF AUSTRALIA

Family Law (Child Abduction Convention) Regulations.

Affidavit in Support of Application for the Return of a Child in Accordance with the Convention on the Civil Aspects of International Child Abduction

AFFIDAVIT

I, DOREEN EDITH MUIRHEAD of 164 Liverpool Road, Ashfield in the Slate of New South Wales, Solicitor, affirm as follows:

1. I am a solicitor of the Supreme Court of New South Wales.

2. I am employed by the New South Wales Department of Community Services which is the Central Authority. for the State of New South Wales pursuant to the Hague Convention on the, Civil Aspects of International Child Abduction (the Convention).

3. I have knowledge of the application made by Rajani Kannepalli Kanth pursuant to the Convention seeking the return of his children, Malini Amstel Kanth born I April 1993 and Anjana Kesari Kanth born-20 February 1996 to Australia.

4. I have been informed by Rajani Kannepalli Kanth that there are no orders made by the Family Court of Australia or under the Family Law Act 1975 in respect of his children, Malini Amstel Kanth and Anjana Kesari Kanth, relating to matters of residence or contact (formerly custody and access).

5. Section 61 B of the Family Law Act 1975 as amended (hereafter "the Act") states:

"In this Part, "parental responsibility" in relation to a child, means all the duties, powers. responsibilities and authority which. by law, parents havc in relation to children."

6. Section 61 C of the Act states:

(1) Each of the parents of a child. who is not 18 has parental responsibility for the child.

(2) Subsection (1) has effect despite any changes in the nature of the relationships of the child's parents. It is not affected, for example, by the parents becoming separated or by either or both of them marrying or re- marrying.

(3) Subsection (1) has effect subject to any order of a court for the time being in force (whether or not made under this Act and whether made before or after the commencement of this section)."

7. It is submitted that Rajani Kannepalli Kanth has "rights of custody" pursuant to Article 3 of the Convention and was exercising those rights at the time Immediatly prior to the wrongful removal of the children to the United States of America.

AFFIRMED at Ashfield in the State of New South Wales on 14 May, 1999 before me:

D. Muirhead
Doreen Edith Muirhead

Solicitor of the Supreme Court of New South Wales.

APPENDIX 'I'

Articles of the Hague Convention on International Child Abduction

HAGUE CONFERENCE

ON PRIVATE INTERNATIONAL LAW

FOURTEENTH SESSION

FINAL ACT

(Excerpts containing the text of the 1980 Hague Convention on the Civil Aspects of International Child Abduction and the recommended form for the Request for Return)

Final Act of the Fourteenth Session

The undersigned, Delegates of the Governments of Argentina Australia, Austria, Belgium, Canada, Czechoslovakia, Denmark, the Arab Republic of Egypt, Finland, France, the Federal Republic of Germany, Greece, Ireland, Israel, Italy, Japan, Jugoslavia, Luxemburg, the Netherlands, Norway, Portugal, Spain, Surinam, Sweden, Switzerland, Turkey, the United Kingdom of Great Britain and Northern Ireland, the United States of America and Venezuela, and the Representatives of the Government of Brazil, the Holy See, Hungary, Monaco, Morocco, the Union of Soviet Socialist Republics and Uruguay participating by invitation or as Observer, convened at the Hague on the 6th October 1980, at the invitation of the Government of the Netherlands, in the Fourteenth Session of the Hague Conference on Private International Law.

Following the deliberations laid down in the records of the meetings, have decided to submit to their Governments---

A. The following draft Conventions---

I.

CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION

The States signatory to the present Convention,

Firmly convinced that the interests of children are of paramount importance in matters relating to their custody,

Desiring to protect children internationally from the harmful effects of their wrongful removal or retention and to establish

procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access,

Have resolved to conclude a Convention to this effect, and have agreed upon the following provisions--

CHAPTER I--SCOPE OF THE CONVENTION

Article 1

The objects of the present Convention are--

(a) to secure the prompt return of children wrongfully removed to or retained in any contracting State; and

(b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.

Article 2

Contracting States shall take all appropriate measures to secure within their territories the implementation of the objects of the Convention. For this purpose they shall use the most expeditious procedures available.

Article 3

The removal or the retention of a child is to be considered wrongful where--

(a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the

law of the State in which the child was habitually resident immediately before the removal or retention; and

(b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

The rights of custody mentioned in sub-paragraph (a) above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.

Article 4

The Convention shall apply to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights. The Convention shall cease to apply when the child attains the age of 16 years.

Article 5

For the purposes of this Convention---

(a) 'rights of custody' shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence;

(b) 'rights of access' shall include the right to take a child for a limited period of time to a place other than the child's habitual residence.

CHAPTER II--CENTRAL AUTHORITIES

Article 6

A Contracting State shall designate a Central Authority to discharge the duties which are imposed by the Convention upon such authorities.

Federal States, States with more than one system of law or States having autonomous territorial organizations shall be free to appoint more than one Central Authority and to specify the territorial extent of their powers. Where a State has appointed more than one Central Authority, it shall designate the Central Authority to which applications may be addressed for transmission to the appropriate Central Authority within that State.

Article 7

Central Authorities shall co-operate with each other and promote co-operation amongst the competent authorities in their respective States to secure the prompt return of children and to achieve the other object's of this convention.

In particular, either directly or through any intermediary, they shall take all appropriate measures

(a) to discover the whereabouts of a child who has been wrongfully removed or retained;

(b) to prevent further harm to the child or prejudice to interested parties by taking or causing to be taken provisional measures;

(c) to secure the voluntary return of the child or to bring about an amicable resolution of the issues;

(d) to exchange, where desirable, information relating to the

social background of the child;

(e) to provide information of a general character as to the law of their State in connection with the application of the Convention;

(f) to initiate or facilitate the institution of judicial or administrative proceedings with a view to obtaining the return of the child and, in a proper case, to make arrangements for organizing or securing the effective exercise of rights of access;

(g) where the circumstances so require, to provide or facilitate the provision of legal aid and advice, including the participation of legal counsel. and advisers;

(h) to provide such administrative arrangements as may be necessary and appropriate to secure the safe return of the child;

(i) to keep each other informed with respect to the operation of this Convention and, as far as possible, to eliminate any obstacles to its application.

CHAPTER III--RETURN OF CHILDREN

Article 8

Any person, institution or other body claiming that a child has been removed or retained in breach of custody rights may apply either to the Central Authority of the child's habitual residence or to the Central Authority of any other Contracting State for assistance in securing the return of the child.

The application shall contain--

(a) information concerning the identity of the applicant, of the

child and of the person alleged to have removed or retained the child;

(b) where available, the date of birth of the child;

(c) the grounds on which the applicant's claim for return of the child is based;

(d) all available information relating to the whereabouts of the child and the identity of the person with whom the child is presumed to be. The application may be accompanied or supplemented by -

(e) an authenticated copy of any relevant decision or agreement;

(f) a certificate or an affidavit emanating from a Central Authority, or other competent authority of the State of the child's habitual residence, or from a qualified person, concerning the relevant law of that State;

(g) any other relevant document.

Article 9

If the Central Authority which receives an application referred to in Article 8 has reason to believe that the child is in another Contracting State, it shall directly and without delay transmit the application to the Central Authority of that Contracting State and inform the requesting Central Authority, or the applicant, as the case may be.

Article 10

The Central Authority of the State where the child is shall take

or cause to be taken all appropriate measures in order to obtain the voluntary return of the child.

Article 11

The judicial or administrative authorities of contracting States shall act expeditiously in proceedings for the return of children.

If the judicial or administrative authority concerned has not reached a decision within six weeks from the date of commencement of the proceedings, the applicant or the Central Authority of the requested State, on its own initiative or if asked by the Central Authority of the requesting State, shall have the right to request a statement of the reasons for the delay. If a reply is received by the Central Authority of the requested State, that Authority shall transmit the reply to the Central Authority of the requesting State, or to the applicant, as the case may be.

Article 12

Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.

The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.

Where the judicial or administrative authority in the requested State has reason to believe that the child has been taken to another State, it may stay the proceedings or dismiss the application for the return of the child.

Article 13

Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that--

(a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or

(b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.

In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence.

Article 14

In ascertaining whether there has been a wrongful removal or retention within the meaning of Article 3, the judicial or administrative authorities of the requested State may take notice directly of the law of, and of judicial or administrative decisions, formally recognized or not in the State of the habitual residence of the child, without recourse to the specific procedures for the proof of that law or for the recognition of foreign decisions which would otherwise be applicable.

Article 15

The judicial or administrative authorities of a Contracting State may, prior to the making of an order for the return of the child, request that the applicant obtain from the authorities of the State of the habitual residence of the child a decision or other determination that the removal or retention was wrongful within the meaning of Article 3 of the Convention, where such a decision or determination may be obtained in that State. The Central Authorities of the Contracting States shall so far as practicable assist applicants to obtain such a decision or determination.

Article 16

After receiving notice of a wrongful removal or retention of a child in the sense of Article 3, the judicial or administrative authorities of the Contracting State to which the child has been removed or in which it has been retained shall not decide on the merits of rights of custody until it has been determined that the child is not to be returned under this Convention or unless an application under this Convention is not lodged within a reasonable time following receipt of the notice.

Article 17

The sole fact that a decision relating to custody has been given in or is entitled to recognition in the requested State shall not be a ground for refusing to return a child under this Convention, but the judicial or administrative authorities of the requested State may take account of the reasons for that decision in applying this Convention.

Article 18

The provisions of this Chapter do not limit the power of a judicial or administrative authority to order the return of the child at any time.

Article 19

A decision under this convention concerning the return of the child shall not be taken to be a determination on the merits of any custody issue.

Article 20

The return of the child under the provisions of Article 12 may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms.

CHAPTER IV--RIGHTS OF ACCESS

Article 21

An application to make arrangements for organizing or, securing the effective exercise of rights of access may be presented to the Central Authorities of the Contracting States in the same way as an application for the return of a child.

The Central Authorities are bound by the obligations of co-operation which are set forth in Article 7 to promote the peaceful enjoyment of access rights and the fulfillment of any conditions to which the exercise of those rights may be subject. The Central Authorities shall take steps to remove, as far as possible, all obstacles to the exercise of such rights. The Central Authorities, either directly or through intermediaries, may initiate or assist in the institution of proceedings with a view to organizing or protecting these rights and securing respect for the conditions to which the exercise of these rights may be subject.

CHAPTER V--GENERAL PROVISIONS

Article 22

No security, bond or deposit, however described, shall be required to guarantee the payment of costs and expenses in the judicial or administrative proceedings falling within the scope of this Convention.

Article 23

No legalization or similar formality may be required in the context of this Convention.

Article 24

Any application, communication or other document sent to the Central Authority of the requested State shall be in the original language, and shall be accompanied by a translation into the official language or one of the official languages of the requested State or, where that is not feasible, a translation into French or English.

However, a Contracting State may, by making a reservation in accordance with Article 42, object to the use of either French or English, but not both, in any application, communication or other document sent to its Central Authority.

Article 25

Nationals of the Contracting States and persons who are habitually resident within those States shall be entitled in matters concerned with the application of this Convention to legal aid and advice in any other Contracting State on the same conditions as if they themselves were nationals of and habitually resident in that State.

Article 26

Each Central Authority shall bear its own costs in applying this Convention.

Central Authorities and other public services of Contracting States shall not impose any charges in relation to applications submitted under this Convention. In particular, they may not require any payment from the applicant towards the costs and expenses of the proceedings or, where applicable, those arising from the participation of legal counsel or advisers. However, they may require the payment of the expenses incurred or to be incurred in implementing the return of the child.

However, a Contracting State may, by making a reservation in accordance with Article 42, declare that it shall not be bound to assume any costs referred to in the preceding paragraph resulting from the participation of legal counsel or advisers or from court proceedings, except insofar as those costs may be covered by its system of legal aid and advice.

Upon ordering the return of a child or issuing an order concerning rights of access under this Convention, the judicial or administrative authorities may, where appropriate, direct the person who removed or retained the child, or who prevented the exercise or rights of access, to pay necessary expenses incurred by or on behalf of the applicant, including travel expenses, any costs incurred or payments made for locating the child, the costs of legal representation of the applicant, and those of returning the child.

Article 27

When it is manifest that the requirements of this Convention are not fulfilled or that the application is otherwise not well founded, a Central Authority is not bound to accept the application. In that case, the Central Authority shall forthwith inform the applicant or the Central Authority through which the application was submitted, as the case may be, of its reasons.

Article 28

A Central Authority may require that the application be accompanied by a written authorization empowering it to act on behalf of the applicant, or to designate a representative so to act.

Article 29

This Convention shall not preclude any person, institution or body who claims that there has been a breach of custody or access rights within the meaning of Article 3 or 21 from applying directly to the judicial or administrative authorities of a Contracting State, whether or not under the provisions of this

Convention.

Article 30

Any application submitted to the Central Authorities or directly to the judicial or administrative authorities of a Contracting State in accordance with the terms of this Convention, together with documents and any other information appended thereto or provided by a Central Authority, shall be admissible in the courts or administrative authorities of the Contracting States.

Article 31

In relation to a State which in matters of custody of children has two or more systems of law applicable in different territorial units--

(a) any reference to habitual residence in that State shall be construed as referring to habitual residence in a territorial unit of that State;

(b) any reference to the law of the State of habitual residence shall be construed as referring to the law of the territorial unit in that State where the child habitually resides.

Article 32

In relation to a State which in matters of custody of children has two or more systems of law applicable to different categories of persons, any reference to the law of that State shall be construed as referring to the legal system specified by the law of that State.

Article 33

A State within which different territorial units have their own rules of law in respect of custody of children shall not be bound to apply this Convention where a State with a unified system of law would not be bound to do so.

Article 34

This Convention shall take priority in matters within its scope over the Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of minors, as between Parties to both Conventions. Otherwise the present Convention shall not restrict the application of an international instrument in force between the State of origin and the State addressed or other law of the State addressed for the purposes of obtaining the return of a child who has been wrongfully removed or retained or of organizing access rights.

Article 35

This Convention shall apply as between Contracting States only to wrongful removals or retentions occurring after its entry into force in those States.

Where a declaration has been made under Article 39 or 40, the reference in the preceding paragraph to a Contracting State shall be taken to refer to the territorial unit or units in relation to which this convention applies.

Article 36

Nothing in this convention shall prevent two or more Contracting States, in order to limit the restrictions to which the return of the child may be subject, from agreeing among themselves to derogate from any provisions of this Convention

which may imply such a restriction.

CHAPTER VI--FINAL CLAUSES

Article 37

The Convention shall be open for signature by the States which were Members of the Hague Conference on Private International Law at the time Of its Fourteenth Session.

It shall be ratified, accepted or approved and the instruments of ratification, acceptance or approval shall be deposited with the ministry of Foreign Affairs of the Kingdom of the Netherlands.

Article 38

Any other State may accede to the Convention.

The instrument of accession shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

The Convention shall enter into force for a State acceding to it on the first day of the third calendar month after the deposit of its instrument of accession.

The accession will have effect only as regards the relations between the acceding State and such Contracting States as will have declared their acceptance of the accession. Such a declaration will also have to be made by any Member State ratifying, accepting or approving the Convention after an accession. Such declaration shall be deposited at the ministry of Foreign Affairs of the Kingdom of the Netherlands; this ministry shall forward. through diplomatic channels, a certified copy to each of the Contracting States.

The Convention will enter into force as between the acceding State and the State that has declared its acceptance of the accession on the first day of the third calendar month after the deposit of the declaration of acceptance.

Article 39

Any State may, at the time of signature, ratification, acceptance, approval or accession, declare that the Convention shall extend to all the territories for the international relations of which it is responsible, or to one or more of them. Such a declaration shall take effect at the time the Convention enters into force for that State.

Such declaration, as well as any subsequent extension, shall be notified to the ministry of Foreign Affairs of the Kingdom of the Netherlands.

Article 40

If a Contracting State has two or more territorial units in which different systems of law are applicable in relation to matters dealt with in this Convention, it may at the time of signature, ratification, acceptance, approval or accession declare that this Convention shall extend to all its territorial units or only to one or more of them and may modify this declaration by submitting another declaration at any time.

Any such declaration shall be notified to the ministry of Foreign Affairs of the Kingdom of the Netherlands and shall state expressly the territorial units to which the Convention applies.

Article 41

Where a Contracting state has a system of government under which executive, judicial and legislative powers are distributed between central and other authorities within that State, its signature or ratification, acceptance or approval of, or accession to this Convention, or its making of any declaration in terms of Article 40 shall carry no implication as to the internal distribution of powers within that State.

Article 42

Any State may, not later than the tine of ratification, acceptance, approval or accession, or at the time of making a declaration in terms of Article 39 or 40, make one or both of the reservations provided for in Article 24 and Article 26, third paragraph. No other reservation shall be permitted.

Any State may at any time withdraw a reservation it has made. The withdrawal shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

The reservation shall cease to have effect on the first day of the third calendar month after the notification referred to in the preceding paragraph.

Article 43

The Convention shall enter into force on the first day of the third calendar month after the deposit of the third instrument of ratification, acceptance, approval or accession referred to in Articles 37 and 38.

Thereafter the Convention shall enter into force--

1. for each State ratifying, accepting, approving or acceding to it

subsequently, on the first day of the third calendar month after the deposit of its instrument of ratification, acceptance, approval or accession;

2. for any territory or territorial unit to which the Convention has been extended in conformity with Article 39 or 40, on the first day of the third calendar month after the notification referred to in that Article.

Article 44

The Convention shall remain in force for five years from the date of its entry into force in accordance with the first paragraph of Article 43 even for States which subsequently have ratified, accepted, approved it or acceded to it. If there has been no denunciation, it shall be renewed tacitly every five years.

Any denunciation shall be notified to the ministry of Foreign Affairs of the Kingdom of the Netherlands at least six months before the expiry of the five year period. It may be limited to certain of the territories or territorial 'units to which the Convention applies. I The denunciation shall have effect only as regards the State which has notified it. The Convention shall remain in force for the other Contracting States.

Article 45

The Ministry of Foreign Affairs of the Kingdom of the Netherlands shall notify the States Members of the Conference, and the States which have acceded in accordance with Article 38, of the following--

1. the signatures and ratifications, acceptances and approvals

referred to in Article 37;

2. the accessions referred to in Article 38;

3. the date on which the Convention enters into force in accordance with Article 43;

4. the extensions referred to in Article 39;

5. the declarations referred to in Articles 38 and 40;

6. the reservations referred to in Article 24 and Article 26, third paragraph, and the withdrawals referred to in Article 42;

7. the denunciations referred to in Article 44.

In witness whereof the undersigned, being duly authorized thereto, have signed this Convention.

Done at The Hague, on the 25th day of October 1980 in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Kingdom of the Netherlands, and of which a certified copy shall be sent, through diplomatic channels, to each of the States Members of the Hague Conference on Private International Law at the date of its Fourteenth Session.

Public Law 100-300
100th Congress
[H.R. 3971, 29 Apr 19881

42 USC 11601 et seq

An Act

To establish procedures to implement the Convention on the Civil Aspects of International Child Abduction, done at The Hague on October 25, 1980, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "International Child Abduction Remedies Act".

SEC. 2. FINDINGS AND DECLARATIONS [42 USC 11601]

(a) Findings.--The Congress makes the following findings:

(1) The international abduction or wrongful retention of children is harmful to their well-being.

(2) Persons should not be permitted to obtain custody of children by virtue of their wrongful removal or retention.

(3) International abductions and retentions of children are increasing, and only concerted cooperation pursuant to an international agreement can effectively combat this problem.

(4) The Convention on the Civil Aspects of International Child Abduction, done at The Hague on October 25, 1980, establishes legal rights and procedures for the prompt return of children who have been wrongfully removed or retained, as well as for securing the exercise of visitation rights. Children who are wrongfully removed or retained within the meaning of the Convention are to be promptly returned unless one of the narrow exceptions set forth in the Convention applies. The Convention provides a sound treaty framework to help resolve the problem of international abduction and retention of children and will deter such wrongful removals and retentions.

(b) DECLARATIONS. -The Congress makes the following declarations:

(1) It is the purpose of this Act to establish procedures for the implementation of the Convention in the United States.

(2) The provisions of this Act are in addition to and not in lieu of the provisions of the Convention.

(3) In enacting this Act the Congress recognizes

(A) the international character of the Convention; and

(B) the need for uniform international interpretation of the Convention.

(4) The Convention and this Act empower courts in the United States to determine only rights under the Convention and not the merits of any underlying child custody claims.

SEC. 3. DEFINITIONS. (42 USC 116021

For the purposes of this Act-

(1) the term "applicant" means any person who, pursuant to the Convention, files an application with the United States Central Authority or a Central Authority of any other party to the Convention for the return of a child alleged to have been wrongfully removed or retained or for arrangements for organizing or securing the effective exercise of rights of access pursuant to the Convention; International Child Abduction, done at The Hague on October 25, 1980;

(2) the term "Convention" means the Convention on the Civil Aspects of

(3) the term "Parent Locator Service" means the service established by the Secretary of Health and Human Services under section 453 of the Social Security Act (42 U.S.C. 653);

(4) the term "Petitioner" means any person who, in accordance with this Act, files a petition in court seeking relief under the Convention

(5) the term "person" includes any individual, institution, or other legal entity or other legal entity or body

(6) the term "respondent" means any person against whose interests a petition is filed in court, in accordance with this Act, which seeks relief under the Convention;

(7) the term "rights of access" means visitation rights;

(8) the term "State" means any of the several States, the District of Columbia, and any commonwealth, territory, or possession of the United States; and

(9) the term "United States Central Authority" means the agency of the Federal Government designated by the President under section 7(a)

SEC. 4. JUDICIAL REMEDIES. [42 USC 11603] .

(a) JURISDICTION OF THE COURTS.-The courts of the States and the United States district courts shall have concurrent original jurisdiction of actions arising under the Convention.

(b) PETITIONS.-Any person seeking to initiate judicial proceedings under the Convention for the return of a child or for arrangements for organizing or securing the effective exercise of rights of access to a child may do so by commencing a civil action by filing a petition for the relief sought in any court which has jurisdiction of such action and which is authorized to exercise it's jurisdiction in the place where the child is located at the time the petition is filed.

(c) NOTICE.-Notice of an action brought under subsection (b) shall be given in accordance with the applicable law governing notice in interstate child custody proceedings.

(d) DETERMINATION OF CASE.-The court in which an action is brought under subsection (b) shall decide the case in accordance with the Convention.

(e) BURDENS OF PROOF.-(1) A petitioner in an action brought under subsection (b) shall establish by a preponderance of the evidence-

(A) in the case of an action for the return of a child, that the child has been wrongfully removed or retained within the

meaning of the Convention; and

(B) in the case of an action for arrangements for organizing or securing the effective exercise of rights of access, that the petitioner has such rights.

(2) In the case of an action for the return of a child, a respondent who opposes the return of the child has the burden of establishing-

(A) by clear and convincing evidence that one of the exceptions set forth in article 13b or 20 of the Convention applies; and

(B) by a preponderance of the evidence that any other exception set forth in article 12 or 13 of the Convention applies.

(f) APPLICATION OF THE CONVENTION.-For purposes of any action brought under this Act-

(1) the term "authorities", as used in article 15 of the Convention to refer to the authorities of the state of the habitual residence of a child, includes courts and appropriate government agencies:

(2) the terms "wrongful removal or retention" and "wrongfully removed or retained", as used in the Convention, include a removal or retention of a child before the entry of a custody order regarding that child; and

(3) the term "commencement ot proceedings", as used in article 12 of the Convention, means, with respect to the return of a child located in the United States, the filing of a petition in accordance with subsection (b) of this section.

(g) FULL FAITH AND CREDIT. -Full faith and credit shall be

accorded by the courts of the states and the courts of the United States to the judgment of any other such court ordering or denying the return of a child, pursuant to the Convention, in an action brought under this Act.

(h) REMEDIES UNDER THE CONVENTION NOT EXCLUSIVE.-The remedies established by the Convention and this Act shall be in addition to remedies available under other laws or international agreements.

SEC. 5. PROVISIONAL REMEDIES. [42 USC 11604]

(a) AUTHORITY OF COURTS.-In furtherance of the objectives of article 7(b) and other provisions of the Convention, and subject to the provisions of subsection (b) of this section, any court exercising jurisdiction of an action brought underrsection 4(b) of this Act may take or cause to be taken measures under Federal or State law, as appropriate, to protect the well-being of the child involved or to prevent the further removal or concealment before the final disposition of the petition.

(b) LIMITATION ON AUTHORITY.-No court exercising jurisdiction of an action brought under section 4(b) may, under subsection (a) of this section, order a child removed from a person having physical control of the child unless the applicable requirements of State law are satisfied.

SEC. 6. ADMISSIBILITY OF DOCUMENTS. [42 USC 11605]

With respect to any application to the United States Central Authority, or any petition to a court under section 4, which seeks relief under the Convention, or any other documents or information included with such application or petition or provided after such submission which relates to the application

or petition, as the case may be, no authentication of such application, petition, document, or information shall be required in order for the application, petition, document, or information to be admissible in court.

SEC. 7. UNITED STATES CENTRAL AUTHORITY. [42 USC 11606]

(a) DESIGNATION.-The President shall designate a Federal agency to serve as the Central Authority for the United States under the Convention.

(b) FUNCTIONS.-The functions of the United States Central Authority are those ascribed to the Central Authority by tie Convention and this Act.

(c) REGULATORY AUTHORITY.-The United States Central Authority is authorized to issue such regulations as may be necessary to carry out its functions under the Convention and this Act.

(d) OBTAINING INFORMATION FROM PARENT LOCATOR SERVICE. The United States Central Authority may, to the extent authorized by the Social Security Act, obtain information from the Parent Locator Service.

SEC. 8. COSTS AND FEES. [42 USC 116071

(a) ADMINISTRATIVE COSTS. -No department, agency, or instrumentality of the Federal Government or of any State or local government may impose on an applicant any fee in relation to the administrative processing of applications submitted under the Convention.

(b) COSTS INCURRED IN CIVIL ACTIONS.-(I) Petitioners may be required to bear the costs of legal counsel or advisors, court costs incurred in connection with their petitions, and travel costs for the return of the child involved and any accompanying persons, except as provided in paragraphs (2) and (3).

(2) Subject to paragraph (3), legal fees or court costs incurred in connection with an action brought under section 4 shall be borne by the petitioner unless they are covered by payments from Federal State, or local legal assistance or other programs.

(3) Any court~ordering the return of a child pursuant to an action brought under section 9 shall order the respondent to pay necessary expenses incurred by or on behalf of the petitioner, including court costs, legal fees, foster home or other care during the course of proceedings in the action, and

transportation costs related to the return of the child, unless the respondent establishes that such order would be clearly inappropriate.

SEC. 9. COLLECTION, MAINTENANCE, AND DISSEMINATION OF INFORMATION. (42 USC 11608]

(a) IN GENERAL.-In performing its functions under the Convention, the United States Central Authority may, under such conditions as the Central Authority prescribes by regulation, but subject to subsection (c), receive from or transmit to any department, agency, or instrumentality of the Federal Government or of any State or foreign government, and receive from or transmit to any applicant, petitioner, or respondent, information necessary to locate a child or for the purpose of otherwise implementing the Convention with respect to a child, except that the United States Central

Authority-

(I) may receive such information from a Federal or State department, agency, or instrumentality only pursuant to applicable Federal and State statutes; and

(2) may transmit any information received under this subsection notwithstanding any provision of law other than this Act.

(b) REQUESTS FOR INFORMATION.-Requests for *information under* this section shall be submitted in such manner and form as the United States Central Authority may prescribe by regulation and shall be accompanied or supported by such documents as the United States Central Authority may require.

(c) RESPONSIBILITY OF GOVERNMENT ENTITIES.-Whenever any department, agency, or instrumental of the United States or of any State receives a request from the United States Central Authority for information authorized to be provided to such Central Authority under subsection (a), the head of such department, agency, or instrumentality shall promptly cause a search to be made of the files and records maintained by such department, agency, or instrumentality in order to determine whether the information requested is contained in any such files or records. If such search discloses the information requested, the head of such department, agency, or instrumentality shall immediately transmit such information to the United States Central Authority, except that any such information the disclosure of which-

(1) would adversely affect the national security interests of the United States or the law enforcement interests of United States or of any State: or

(2) would be prohibited by section 9 of title 13, United States enforcement Code; shall not be transmitted to the Central Authority. The head of such department, agency, or instrumentality shall, immediately upon completion of the requested search, notify the Central Authority of the results of the search, and whether an exception set forth in paragraph (1) or (2) applies. In the event that the United States Central Authority receives information and the appropriate Federal or State department, agency, or instrumentality thereafter notifies the Central Authority that an exception set forth in paragraph (1) or (2) applies to that information, the Central Authority may not disclose that information under subsection (a).

(d) INFORMATION AVAILABLE FROM PARENT LOCATOR SERVICE. -To the extent that information which the United States Central Authority is authorized to obtain under the provisions of subsection (c) can be obtained through the Parent Locator Service, the United States Central Authority shall first seek to obtain such information from the Parent Locator Service, before requesting such information directly under the provisions of subsection (c) of this section.

(e) RECORDKEEPING.-The United States Central Authority shall maintain appropriate records concerning its activities and the disposition of cases brought to its attention.

SEC. 10. INTERAGENCY COORDINATING GROUP. [42 USC 11609]

The Secretary of State, the Secretary of Health and Human Services, and the Attorney General shall designate Federal employees and may, from time to time, designate private citizens to serve on an interagency coordinating group to monitor the operation of the Convention and to provide advice

on its implementation to the United States Central Authority and other Federal agencies. This group shall meet from time to time at the request of the United States Central Authority. The agency in which the United States Central Authority is located is authorized to reimburse such private citizens for travel and other expenses incurred in participating at meetings of the interagency coordinating group at rates not to exceed those authorized under subchapter 1 of chapter 57 of title 5, United States Code, for employees of agencies.

SEC. 11. AGREEMENT FOR USE OF PARENT LOCATOR SERVICE IN DETERMINING WHEREABOUTS OF PARENT OR CHILD.

Section 463 of the Social Security Act (42 U,S.C. 663) is amended-

(1) by striking "under this section" in subsection (b) and inserting "under subsection (a)";

(2) by striking "under this section" where it first appears in subsection (c) and inserting "under subsection (a), (b), or (e)"; and

(3) by adding at the end the following new subsection:

"(e) The Secretary shall enter,into an agreement with the Central Authority designated by the President in accordance with section 7 of the International Child Abduction Remedies Act, under which the services of the Parent Locator Service established under section 453 shall be made available to such Central Authority upon its request for the purpose of locating any parent or child on behalf of an applicant to such Central Authority within the meaning of section 3(1) of that Act. The Parent Locator Service shall charge no fees for services requested pursuant to this subsection.".

SEC. 12. AUTHORIZATION OF APPROPRIATIONS. [42 USC 11610]

There are authorized to be appropriated for each fiscal year such sums as may be necessary to carry out the purposes of the Convention and this Act.

Approved April 29, 1988.

LEGISLATIVE HISTORY-H.R. 3971:

HOUSE REPORTS: No. 100-525 (Comet. on the Judiciary).
CONGRESSIONAL RECORD, Vol, 134 (1988):
Mar. 28, considered and passed House.
Apr, 12, considered and passed Senate, amended.
Apr. 25, House concurred in Senate amendment.

APPENDIX 'K'

Petitioners's Primary Hague Brief
***Excluded* by Both**
District and Circuit Courts

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US DISTRICT COURT CENTRAL DIVISION DISTRICT OF UTAH

RAJANI KANTH	**PETITIONER'S REPLY TO**
Petitioner	**RESPONDENT'S**
v.	**MEMORANDUM**
CORY KANTH	
Respondent	**CASE# 2:99 CV 532 C**
	Judge
Tena Campbell	

Preamble:

I:

1.0 Petitioner is attempting to defend the rights of two minor children rudely, and wrongfully, abducted from their *habitual residence* in Australia where they had lived since June of 97 through March 25th of 99, {with a break from April to July of 98) when Respondent, who suffers from fits of dementia, vanished with them *(Exhibit: I)* albeit on the basis of a carefully constructed plot spearheaded by her parents.

1.1 Only a part of the Hague Case Law that supports the Petitioner is already cited in the original Petition prepared by his previous counsel ; Petitioner will be adding far more evidence, in that vein, while also explaining the details of his Case with respect to the Facts therein, and the Rules and Stated

Intent of the Hague Convention for the Return of Abducted Children.

1.2 *Court will note that Petitioner's application has the support of the Commonwealth of Australia - which forwarded his Petition to the US Central Authority (which asked Respondent to voluntarily return the children: Exhibit: 2) - whose Supreme Court (of New South Wales) has provided us with an Affidavit (Exhibit:3) pointing to the clear and unambiguous violation of his Custodial Rights, under Australian Family Law, rights that have been systematically denied since the abduction on March 25`th, 99 (with the securance by Respondent of an ex parte "protective order" upon arrival in the US) from Sydney, Australia.*

1.3 *With all due respect to the high authority of the Court, given the undeniable facts of the Abduction, the irrefutable history of family residence in Australia for some 18 months, and the solemn Affidavit submitted by the Commonwealth of Australia in support of his Petition -to which by law full faith and credit need be shown - it is Court's obligation under International Law [Article 12 of the Hague Convention] to which the US is a signatory, to order the immediate return of the children to Australia.*

This much is warranted by the Convention and the enabling US Federal Law covering such matters; anything less would send a signal to the world which will monitor and record this Hague case carefully, that *kidnapping and transporting minor children is become the optimal modern-day means to a leveraged divorce and custody suit to follow,* much like kidnapping of young women was the primitive means to marriage in many tribal societies in Africa.

Given that Respondent wilfully, if implicitly, admits to all material facts already submitted by Petitioner in his original Petition as stated in her *Respondent's Memorandum* (page 1) dated the 18th' of August:, the task becomes almost a matter of

summary judgement; to quote:

> *The only element contested by Mrs. Kanth is Mr. Kanth 's assertion that the return of the children from Australia to the United States on March 25, 1999 was wrongful.*

II. Standards of Proof in the Convention

2.0 The Petitioner in this Hague Case is held to a much lower standard of proof by the Hague protocols than the Respondent, charged with only a *preponderance of evidence,* that does not require to be authenticated, to demonstrate that the *Removal* was *Wrongful* under the Convention.

The Respondent, on the other hand, is required to submit a defense that must rise to the level of *Clear and Convincing* evidence, on very narrowly and very conservatively specified grounds,. with respect to Articles 13b and 20; (albeit with *a Preponderance of Evidence* with regard to the exceptions in Articles 12 and 13.).

This differential apportionment of burdens of proof reflects the explicit intent of the Convention which is weighted toward the Duty to Return abductees to their habitual residence.

2.1 To sum up: the Defense *against* the Petition must show:

a) *by clear and convincing evidence that there is a grave risk to the child upon return. Convention, Art 13b; 42 U.S. C. 11603 (e) (2) (A)*

b) *by clear and convincing evidence that the return of the child would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms .Convention, Art. 20; 42 U.S.C. 11603 (e) (2) (A)*

c) *by a preponderance of evidence that the proceeding was commenced more than a year after the abduction. Convention,*

Art. 12; 42 U.S. C. 11603 (e) (2) (B)

d) *by a preponderance of evidence that the Petitioner was not actually exercising the custody right at the time of removal or had consented and acquiesced to the removal and retention. Convention Art. 13 a; 42 U.S.C. 11603 (e) (2) (B)*

Court will note, as ruled in ***Friedrich II,*** 78 F.3d at 1067, that *all four* of these exceptions are *`narrow"* and, moreover, as stated by Judge Russell of the US District Court in ***Smith vs Smith*** (Ken.W.Dist.1997, #1:97-CV-7s(R):

Federal courts have the ability to return a child ...even if one of the exceptions applies.

Now Items c and d can be ruled out of court by a simple and direct reference to the facts (*as per Exhibits 2 and 3 already cited*). Petitioner will endeavour to show, additionally, that items a and b neither exist as hypothesized, and/or do not meet the high standard of proof required.
It is worth noting, again, the *logos* of the Convention, as iterated in the comments of Judge Rand of the Family Court in NY in ***Dickbauer v Dickbauer*** (9 Fam.CT. NY 1996, No.V-11789/95):

The US Court of Appeals, Third Circuit, has held that the "Convention's approach to the phenomenon of international child abduction is straightforward. It is designed to restore the factual status quo which is unilaterally altered when a parent abducts a child and aims to protect the legal custody right of the non abducting parent. FNI Pub.Notice 957, SI Fed/.Reg.10494, 10505 (1986). ***Thus the cornerstone of the convention is the mandated return of the child to his or her circumstances prior to the abduction...***

III. Wrongful Removal

a. *A Removal is Wrongful under Article 3 of the Convention if it is in breach of Petitioner's Custody Rights. as delineated in Article 3a. As the Supreme Court of NSW, supporting the Commonwealth of Australia 's support for the Petition., makes radically clear, the Respondent's action was in breach of such rights at the time of abduction when the family lived together as a resident family in Sydney, Australia.*

. *This also comports wish Article 15 of the Convention that, where feasible, seeks and/or places reliance on such a determination by a foreign government.*

c. *As per the import of Article 4 of the Convention, Petitioner's children were Habitually Resident in Australia, a Contracting State within the Convention, since June of 97, (family resident visas remain valid through the year 2001) before the breach occurred, and his job offer from Australia is irrefutable proof of Settled Purpose and Intention. (See* ***Walton vs Walton*** *as will be cited later, and Exhibit 7 of Affidavits dossier).*

. *At the time of their Removal, as per the statement of the Supreme Court of NSW. Petitioner was duly exercising custody rights as per the meaning of Article 3b of the Convention.*

e. *The Respondent kidnapped, i.e. Wrongfully Removed his children, without his knowledge and/or consent, from Australia and has retained them in the USA since March 25'h in violation of Article 3 of the Convention.*

f *And Petitioner filed his Hague complaint on May 14`h in Sydney, and on July 8th in Salt Lake City, in timely fashion, well within the one year term allowed by the Convention under Article 12.*

IV. Authorised Defenses Under the Convention

4.0.1 The only, and highly exceptional, defenses against a Petition for Return authorised by the Hague Convention are:

v. Article 13a: which would apply if had Petitioner NOT been exercising custody rights

ii Article 13b: if there were grave risk of physical or, psychological harm to the children upon return.

iii Article 13: if a mature child objects

iv Article 20: if the country to be returned to is in serious violation of human rights

v Articles 12&13: if Petitioner did NOT have custody rights; and children were NOT removed from the country of Habitual Residence.

Clearly and obviously, as will be demonstrated, NONE of these arguments are germane to this case, since:

a Petitioner was exercising full custodial rights and Sydney was home to the Kanth family since June of 1997 satisfying the import of any reasonable standard of Habitual Residence.

b The children are minors, not mature being under the age of sixteen.

c Australia is NOT in violation of human rights, and, despite all the constructions offered by the Respondent to claim, inappropriately as will be shown, 'grave risk' to the children, Petitioner's supporting Affidavits will make clear that this is a post factum fantasy. Indeed the shoe needs be on the other foot: it is the Respondent who has always posed a risk both to herself, and to her family, given her chronic history of instability and dementia which place children under her sole care always at risk

(see detailed reference to these matters in Exhibit 4 which is part of Petitioner's earlier Petition to Set Aside)

d *Aside from Affidavits brought forward by Respondent's own family and family friends - which should be radically discounted, since they were the co conspirators in the very Removal that is in litigation here, there is no evidence or proof in the slightest that the children were not happy and contented children; indeed, the contrary: as per the various affidavits (See Letters in Exhibit 8 In Exhibits Dossier attached) from senior professors and students, who visited us on a frequent basis in Sydney who were at least, at the very minimum, as responsible as Respondent's family, and ten thousand miles closer to the scene,*

e. *indeed, all charges proffered by the Respondent, even if gospel truth, that speak of a putative `threat' to the Respondent* ***area simply irrelevant to a Hague dispute.*** *Grave Risk, also used by the Respondent, is an Argument in relation to the children; not to the Respondent. As* ***Friedrich vs Friedrich*** *makes clear,* ***the focus is on the child not the parents.*** *At any rate, notwithstanding the contrived nature of these charges it should be apparent to Court that all such matters of division within the family, even if true, instead of being a predictable ploy to legitimise an abduction, could have been and can be dealt within a suitable Family Court action in Australia of which we are all residents.*

f. The central issue the Hague deals with is Jurisdiction. ***A Hague hearing does not address the `best interest' of the child;*** to cite Lord Justice Nourse, quoted by Justice Balcombe in ***Evans v Evans*** (AD 1716 Of 1988, (1989) 1 FLR 135)

> *The judicial... authorities in the country to or in which the child is wrongfully removed or retained cannot refuse to order the return of the child, whether on grounds of choice of forum or on a consideration of what is in the best*

interest of the child or otherwise.

g. *The interests of the child are for a Family Court to decide at the time of a custody debate within the relevant jurisdiction.. It is not the mandate of a Federal Court to be settling custody issues, specially on the heels of an abduction. That would defeat the very purpose of the Convention.*

V. Affidavit Support

5.0 Under 42.USC 11605 no authentication is required for supportive documentation, nor can a Hague Petitioner, in the nature of the case, be required to bring in witnesses, or even legal documents (other than the original application forwarded by the Central Authority), from the country of the Wrongful Removal. A Hague Hearing. leans toward a substantive examination of the facts of the individual case with the burden of proof upon the Respondent. .However, Petitioner has tried to obtain notarised affidavits from Australia, wherever possible, with some previously filed letters are now resubmitted as notarised documents.

5.1 At any rate, Petitioner's various Affidavits establish the following points:

a) *that the Kanth family were a settled, contented family who lived in Sydney much as families live anywhere: they entertained, they had parties for children, the children were engaged in numerous activities as appropriate for their ages,and both parents were wholeheartedly engaged in child rearing and nurturing activities.* ***Indeed the unique aspect of this family is the extent to which their father was also involved in day-to-day primary caretaking functions given:***

1. *The confessed disabilities of the Respondent. (See Exhibit 5)*
2. *The ample time Petitioner devoted to nurturing (See references in*

various Exhibits)

b) *that, in particular, his school going older child had flourished in her new environ faring brilliantly in preschool, in grade school, and in a full pallet of extracurricular activities, inclusive of, and not restricted to, drama school, gymnastics, piano and ballet (Exhibits 6: this is a dossier of various letters). Indeed, the older child had lived the significant third of her young life in Australia (even opening a bank account in her name: Exhibit 6) while the younger daughter had spent two thirds of her entire terrestrial existence there. The children, much as the family enjoyed the general ease and relaxed pace of Australia much as its beaches, zoos parks, and botanical gardens that are justly famous.c) that Petitioner's position in Sydney was, as is usual in Australian academe, a reasonably permanent one subject to a 3 year probationary period (far shorter than the 7 year tenure period in the USA). It also shows that, as a family, all the Kanths had Resident Visas lasting through 2001 (Exhibits submitted in Original Petition)*

d) *That Petitioner and Respondent went there, based on the foregoing points, as a family with settled intentions having come through much job insecurity and privation: indeed Australia was a boon and a godsend given their previous history of penury and privation.*

e) *That an, academic career, unlike others, is one of constant motion until tenure is finally assured. As such, Australia offered the Petitioner the first tenured position he had had ;. The Kanth family had subsisted on foodstamps in Utah, so it was the offer of stability and sustenance that moved both litigants to go to Australia. They had given up habitual indigence to take up a secure and bountiful opportunity in Australia which promised to be renewable beyond the 3 year contract in question (Exhibit 7)*

f) *That Petitioner is a person of unimpeachable moral character*

*with strong family affections and ties unworthy of any and all charge of misconduct brought against him by a Respondent anxious to protect and secure her illegal abduction (See abundant references in affidavits constituting a small dossier of letters of Visitors to our home in Australia, and peer testimony from across the globe: Exhibits 8 & 9)..Court will note that not one such complaint had ever surfaced anytime during the marriage - indeed throughout the many years that both litigants spent in Utah where with the benefit of her loyal family Respondent could easily have brought and pressed charges locally any number of times - .**until abduction day and after.***
Court needs to examine closely letters and cards written by Respondent right up to the very last day in Australia swearing her everlasting love and respect for the man she had planned to betray (Exhibit 10)g) That the Commonwealth of Australia, by Affidavit and by forwarding Petition to the US Central Authority, supports Petitioner's charge of Wrongful Removal. (Exhibit cited previously)

VI Settled Intent

6.0 The. Hague Convention is not about Custody or Divorce but *Jurisdiction.*

a. *The Kanth family lived on Resident Visas as residents of Australia until the Wrongful Removal. In March Of 99. Their Family Visas are still valid and will remain so until renewed in the year 2001.*

b. *They lived (with a short break in between) from June 1997 through March 1999 in Australia. Had the abduction not taken place, they would have stayed on in Australia at least until July 2001.*

c. *A highly important caveat: while the ordinary and, therefore, habitual residence of the Kanth family was Sydney since July of 97, the settled intent and purpose, on their second visit to*

Sydney in July of 98 , with a 3 year academic contract (where an academic year uses up the best part of 2 calendar years) in their pockets is simply incontrovertible.

D. *Even were it to be argued that their return to the US in April of 98, despite leaving all their domestic furnishings behind in Sydney (see, and despite the fact of having signed the 3 year-contract prior to leaving for the holiday in the United States, `unsettles' their original intent for going to Australia, their return to Sydney, in July of 98, on the basis of a solid job offer, nullifies any presumption of `unsettled' intent quite thoroughly and, more to the point, dispositively.*

VII. Revealed Intent of Respondent

7.1 Habitual residence has, however has less to do with length of time, and more with *intentionality*. Intentions are best demonstrated in practice, what economists call *revealed preference* (i.e. Respondent, for all her denials now, after the fact of an actionable abduction, revealed her intent to go to Australia by going there, not once but twice and staying there for 18 months). In this section, Petitioner offers an important sketch of these motivational factors:

a. *the Respondent accompanied Petitioner to Australia not once but twice ; given that each time, the departure was from her parent's home - indeed the Kanths did not have a home in Utah after 1996- warmly seen off at the airport by both her parents, it is truly hard to believe that any coercion could ever have been involved.*

b *Respondent spent* ***a total of 18 months*** *in Australia without revealing her newly discovered postfactum distaste either for her husband or for Australia to anyone out of the dozens whom they interacted with on a daily basis in Sydney who mere all stunned and flabbergasted by her sudden disappearance.*

c *Court will note that Respondent might have left at any point in*

those 18 months had she chosen to, but she did not. ***The bizarre notion of passports being concealed belies the ease with which Respondent disappeared with the children when she chose to.*** *Respondent always had access to all documents and all family funds, since she did the billing, the shopping and the taxes, carrying a joint credit card in her name.*

. *She might have dissolved the marriage right there in Sydney at any point or asked for a separation but she did not.*

e. *She might have sought marital therapy in Sydney if she were experiencing marital discord, but she did not. Indeed therapy, of a different order, was suggested to her several times not in relation to marital discord but her uncontrollable temper in relation to the children.*

f *Her sudden, dramatic, and wholly irrational, modus of departure therefore can only be surmised as a paradigm shy significantly indicative of a deeply disturbed and troubled mind and disposition.*

VIII.

The Rationale for Removal: Vignettes of an Abduction

8.0 Although this section is not wholly relevant to the Hague Petition, since motives for the abduction, and the character of the Respondent, are immaterial to the key matter of **jurisdiction** that the Convention addresses, Petitioner wishes to place the abduction in perspective for the sake of completeness of information available to the Court:: truth is, there were three major influences leading to Respondent's sudden exit:

a) *she witnessed a crime of severe brutality in Sydney which unhinged her chronically unstable psyche a week or so before her departure*

b) *her mother who has manipulated her disabilities all her life, and loathed this marriage and the Petitioner, took advantage of her state of mind to counsel running away. The "ethnic cleansing" hypothesis is documented (Exhibit 4 cited previously) and is a serious matter.*

c) *Respondent suffers from, as nearly as a non-specialist can detect, a hi functioning form of disorder, genetic in origin, which makes her prone to severe anxiety and delusion..*

8.1 *Stated simply, the abduction melodrama was orchestrated by remote control by Respondent's mother.*

8.2 *Evidence for this hypothesis of maternal control comes from Petitioner's experience last April when he arrived in SLC in wake of the wrongful removal. The Respondent told me that she would like to return, couldn't do so until Petitioner spoke to her parents, itself an important fact to consider given her self proclaimed immaturity. (Exhibit S cited already). Petitioner rushed over to find her father amenable to discussion, but not her mother who refused any and all contact. It was this very same lady who pretended not to know where Respondent was when Petitioner called from Australia having discovered the family missing. So fabrication comes as easily to the mother as to the daughter.*

8.3 In this context, Petitioner appends letters and cards (Exhibits cited already) written by the Respondent to the Petitioner that, *virtually to the last day of the Abduction* bearing eloquent witness to:

a) *the warmth and love of their relationship free of the subsequent fabrications of abuse*

b) *and more importantly, Respondent's se f confessed immaturity and inability to care for the children.*

These small tokens indicate a stable, loving marriage shattered only by

the occasional borderline instability of an emotionally disabled human being, a victim of radical substance abuse, toward whom Petitioner continues to harbor both deep affection and sympathy. Indeed her mother can confirm for Court that Petitioner had to call her in one day, while, living in Utah, because an inebriate Respondent had dropped their newborn baby and was throwing up all over the room. Petitioner married someone like that, had two children with her and hoped that care and consideration would effect a benign change of persona. Perhaps Petitioner erred in that regard

8.4. Petitioner is an academic who has authored and published multiple scholarly books, his work recognised by leading thinkers of our time including Linguist Noam Chomsky of MIT and Philosopher Roy Bhaskar of Oxford University (Exhibits 11) He has neither the temperament nor the will to abuse wives and children; in fact he was abused, his truest was betrayed, and his children whom he had cared for from birth were kidnapped, and as such both abused and cajoled.. Such were the leavings of unilateral love. He had lost one family owing to the hazards of tenure denial and financial rigors; and he patiently struggled to protect this new one regardless of costs.

IX. Settled Intent and Motivations of Litigants

9.0 At any rate, to return to the Argument, for his part, as backed up in evidentiary form by various *Affidavits from distinguished academics from around the world,* who knew Petitioner's career interests and plans (for being his referees), Australia offered Petitioner the possibility of tenured permanent employment, the dream, if one can call it that, of anyone and everyone who is in the academy, at a major world class university *(Exhibit 9: cited already and included in dossier of Affidavits).* A *settled purpose,* as far as the Petitioner goes, could not have been better defined. In this day and age few professions, other than academe, offer the probability of secure, virtually lifetime employment: and he had been granted

precisely that.

9.1 In point of fact, though, the *settled intention* in moving to Australia was prompted by even more serious considerations. As children from a bi-cultural family it was important to both parents that children were raised in a cosmopolitan, multi-cultural environment, something that both litigants agreed was implausible in Utah (in fact, Petitioner had previously rejected an offer from a school in multiethnic New York, but only for its public safety record). Sydney fit that bill almost perfectly. Respondent claimed to be in total rapport with Petitioner when litigants left for Sydney.

As an aside, this anecdote: on going to pick up his daughter from her school, in the heart of Sydney one day it took Petitioner a good two minutes to recognise her, within a group of barely 20 kids, amidst about half a dozen close look-alikes! That day he knew they had made the right choice for their children. Stated baldly, litigants left for Australia to escape the scarring tarnish of prejudice based upon `difference'. Having reviewed the experience of two daughters from an earlier marriage who were raised here, Petitioner can confidently say, that, though Utah has various valuable agrarian virtues well worth respecting, multiculturalism is not its strong suit.

9.2 To sum up: the Respondent came willingly, indeed prodding Petitioner in that direction, to Australia and then left of a sudden in a fit of dementia. Her sins, such as they are, must not be allowed to be visited upon Petitioner's children.

X. Habitual Residence and Settled Intent

10.0 The most important phrase in the Hague protocols is *`habitual residence'*. As a matter of deliberate policy, to the discomfiture of more legally minded judicial functionaries, no standardised definition of the phrase has ever been included in

the Hague Convention. It was intended as a simple, non-technical statutory concept.

10.1 The Eleventh Edition of Dicey and Morris on the Conflict of Laws has this to say on the subject:

> *It is greatly to be hoped that the courts will resist the temptation to develop detailed and restrictive rules as to habitual residence ...the facts and circumstances of each case should continue to be assessed without resort to presumptions and presuppositions.*

In effect, to quote a famous opinion, that of Lord Scarman, ***IN R vs Barnet,*** UK, 1983:

> *there must be a degree of settled purpose ...the purpose may be one or they may be several. That is not to say that the propositus intends to stay where he is indefinitely. Indeed his purpose while settled may be for a limited period. Education, business, or profession, employment, health, family, or merely love of the place spring to mind as common reasons for a choice of regular abode... all that is necessary is that the purpose of living where one does has a sufficient degree of continuity to be properly described as settled.*

As Justice Waite goes on to say, in the famous ***Bates*** Case in the UK (1989) that is routinely consulted for this matter of residence, *in effect there is no real distinction between ordinary residence and habitual residence.* Indeed *ordinary* would be the best synonym for *habitual* under the Convention..

10.2 Expert jurist opinion much as actual judicial decisions on *Habitual Residence* that are cited routinely suggest the following:

a) a stay of even *one day* qualifies as habitual residence given a settled purpose and *acclimitisation* of the child (Ruling by Judge Scheindlin in **Brooke vs.Willis,** S.D.N.Y.1995;907 F.Supp1.57).

In Judge Scheindlin's words:

> *Place of habitual residence is determined more by a state of being than by any specified period of time; technically habitual residence can be established after only one day as long as there is some evidence that the child has become "settled" in the location in question.*

b. ***In Re Bates,*** a stay of but *three months* in a rented apartment in New York was enough to establish *habitual residence*. To quote the approving remarks of Judge Paez of the US District Court of the Central District of California, in ***Mozes vs Mozes:***

> *Bates involved a two and a half year old child who had been removed from her mother's apartment in New York and taken by the nanny to the father's home in Englands, with the father's knowledge an approval. Although the child and her parents had lived most of their lives in England, and had only recently rented an apartment in New York where they were to stay three months, the Bates court held that the child's habitual residence was in the US because her care, accomodation, and therapy treatment in New York during the period of three months [or so] that would elapse before the father's return to London "amounted to a purpose with a sufficient degree o. f continuity to enable it properly to be described as settled. "(**Bates,** No. CA.122.89 at 10]*

b. In ***Bennet vs S, Australia,*** 1993 the Judgement endorses a period of under 6 months as enough to define Habitual Residence concurring with Lord Brandon in ***C vs S*** 1990, 2 FLR 442 House of Lords that:

> *A period of under 6 months was determined to be sufficient to establish habitual residence for the purposes of the Convention*

c. Or as Lord Scarman puts it in ***R vs Barnet,*** *Settled Purpose,* once given, obviates duration which can be short or long;

> *Indeed his purpose while settled may be for a limited period.*

d) Indeed, even temporary absences from the resident country do *not* confute the issue of residency:

To cite Dr.Clive, in his Authoritative essay on the subject in the *Juridical Review*, 1997, Part 3, p 137:

> *Existing habitual residence is not lost by the mere fact of leaving the country for a temporary absence which is intended to be of short duration - for example, for a* relatively short holiday.

Finally, and importantly, *habitual residence* is *not the same* as permanent residence. In *Shalit vs Shalit,* the judgement of the court concurred with the following statement: .

> *It does not matter that the United States was not intended to be the children's Permanent residence, nor that it was intended when they came here that they were to return to Israel in 2000. What may happen in the future ordinarily has little, if any, relevance to whether the children have become so `settled' in their place of residence that it may fairly be described, in the present but by reference to the past, as their 'habitual' residence.*

All these comments support the Petitioner's case *and establish the fact that Habitual Residence, a finding of fact rather than a legal construct,* mainly reflects a *`degree of settled purpose';* thereby, all that is needed as proof of the Kanth family's habitual residency in Australia is : a) residency there, and b) a degree of

acclimitisation of the older child (the younger one was but a baby in all this time) in her environs. As such:
Given that Petitioner had accepted initially a six-month renewable contract, and later a 3 year professional academic contract, after a spell on foodstamps in Utah, and a year's visiting professorship in Denmark, and given that Petitioner's elder daughter arrived when 4 and left when 6, while the baby arrived while only 1 and left when 3, not to mention the older daughter's sparkling successes in grade school, after graduating from preschool also in Sydney, as certified by her school principal, and her various other extracurricular activities inclusive of swimming and drama school, music school, ballet school, and gymnastics, (not all, but most, of which are provided in' the affidavits) , the family's stay in Australia from June of 97 to the abduction in March of 99 fits handsomely within the parameters of current expert judicial opinion.

Petitioner's daughter's little life was as complete as it could be anywhere : stated simply there was that `sufficient degree of continuity' cut short only by the guillotine of abduction. (it is a measure of the faith vested in the Respondent's Memorandum opposing the Petition that the complaint is offered therein that the older child had had only ONE ballet lesson; true enough, because she was kidnapped prior to the second!!)

Restated, the litigants had gone to Australia,. *conjoined in purpose:*

1. *to seize advantage of the only (renewable) long term job offer in 4 years*
2. *to seize advantage, of the multi cultural nature of Sydney which, given our bi-cultural family, was a major lure.*

a. *Visit number one (commencing in 97) was on a 6 month contract with the promise of renewal. There was obvious settled intent and purpose on this transfer of residence: the hope was*

that a visiting professorship would turn into a permanent job offer. The renewal did take place, but was trumped by a superior 3 year `tenuretrack' offer from the University of Technology more or less in the same time frame

b. *An assault suffered by Respondent, in Sydney, who refused therapy (Exhibit 12.-See Affidavit from Psychologist Hogan in Sydney; also letter from Professor Chris Terry confirming this), prompted Petitioner to suggest a vacation until taking up the new job offer. So, the Kanth family came to the US in April , with the confidence of the Sydney job offer that they had accepted and pocketed,, fully geared to emotional recovery on the part of the Respondent and relief from collateral anxiety on the part of the Petitioner.*

c. *The return to Sydney (July 98) was far more pleasurable for going without care into a known rather than unknown context with a plum (tenure track) position in a major university with income stability guaranteed (there was even a pension plan.- Exhibit 13) and with a child looking forward eagerly to a school that she had settled into prior to our departure for the US. The Settled Intent here is simply indisputable. The Kanth family was settling into Australian ways, Petitioner's daughter spent 9 straight months in an advanced section for gifted children , in the first grade in Randwick School, excelling in all school and extracurricular activities (See Exhibits cited), and revelling in her mastery of the Australian accent!, before being yanked out of class and stashed on a plane. and told that her father was planning to kill her and the entire family. Unmistakeably, Sydney was the child's, and the family's, ordinary or habitual residence.*

XI Errors and Elisions in Respondent's Defense

11.0 To address now the burden of the objections of the *Respondent's Defense, inclusive of arguments offered by Counsel for*

Respondent at the October 18 Hearing on Petitioner's Motion to Set Aside, In general, Respondent's defense has been barking up the wrong trees, ***posing strictly non-Hague issues for consideration****; as such, the innumerable affidavits of Respondent are only an exercise in superfluity given the track taken that simply does not comport with the jurisdictional parameters of the Convention* (as will be shown). Petitioner is not required to answer to non-Hague arguments, but is doing just that only for the sake of Completeness of this Reply.

11. 1 Defense have seized upon Petitioner's applications to foreign universities as proof that Australia was not the children's *habitual residence*. There is need to clarify two important points in that regard:

a) firstly, all academics tenured or not, test the market to canvas options for a variety of considerations including promotion, upgrade of grants, research facilities, etc (see Exhibits); also it is the normal way that one advertises one's academic wares at annual job markets. And occasionally one picks up bargaining chips to present to one's own institution.

b) More importantly, as only too often repeated, as per Friedrich vs Friedrich, the Hague convention demands that we look backwards not forwards in time; the settled intent is applicable as the sufficient rationale for our original migration to Australia in terms of the Hague requirement of habitual residence The litigants were there; Petitioner had accepted a permanent job there: their children grew up there and went to school there, and the Respondent abducted the children while the family lived there..Petitioner's future career development ideas, while living in Australia are immaterial to the Petition, as they would be were Petitioner to be living presently in Utah on a tenured slot and applying overseas for positions: an

application, or every a set of applications, does not change habitual residence-To cite the judgement in . the definitive Friedrich case:

> *Any future plans that Mrs Friedrich had for Thomas ... are irrelevant to our inquiry...habitual residence can be altered only by a change in geography and the passage of time, not by changes in parental affection and responsibility.*

Similarly, the verdict in **Benson vs Benson** (19 Oct 1998) reads:

> *..too rigorous demands cannot be made concerning the person's intentions for the future ...thus Habitual Residence need not be permanent residence*

c) In point of fact, given their tender ages, the children have lived most of their consciously sentient social lives in Australia rather than elsewhere. It was their ordinary residence from 1997 to 1999.

11.3 In similar vein, the Respondent has seized upon Petitioner's current presence in the US as grounds nullifying the Hague Petition (October 18`x, Court Record). Again this is a profound misconception:

a) Petitioner is here to finance and prosecute his Hague case unfundable on an Australian salary: he is on fixed term leave from his Australian university (Exhibit cited already; see also Exhibit from his New York host institution testifying to this,: Exhibit 14) , he still retains an Australian residence visa, and maintains an apartment in Sydney. (Exhibit 15) It would take him a year to acquire residency in New York. He does not rent an apartment, lives in the dorms, does not have a bank account, and does not own anything, not even a phone in his own name in the US. He is exactly what he purports to be: an Australian resident here in the US on a temporary assignment so as to pursue his Hague Case effectively.

b) More importantly, as the dispositively authoritative Elisa Perez- Vera Report, one of the most cited documents in the Hague literature, makes abundantly clear in. Article 110, (see Exhibit 16) the residence of the Petitioner after filing is immaterial: indeed the presumption is ***that the abductees need to be returned to the Petitioner*** wherever he/she may be located subsequent to filing.

c) Finally, as ***Friedrich vs Friedrich*** makes clear ***it is past experience*** (i.e. of the children) ***rather than future intention*** (of the parents) that governs the notion of habitual residence. As Judge Paez, op.cit., puts it citing Friedrich:

> *To determine habitual residence the court must focus on the child, not the Parents and examine past experience, not future intentions*

Once the Kanth children had lived in Australia, through a good part of 3 calendar years, it does not matter subsequently whether/what their parents may /or may not have intended either for themselves or for their children. Suffice it to say that the children were well acclimatised to their Australian environs as they had to be given that broad chunk of time.

XII Grave Risk The Last Resort Defense

12.0 Realizing the weakness of arguing against the fact of the children's habitual residence in Australia, the Respondent rests the principal burden of her defense on the Grave Risk Defense: the one defense that is the most rarely allowed in Hague Cases, and where clear and convincing evidence must be shown to exist for such a defense to be _ sustained (even after which, as will be shown, Court still retains the discretion to return the child; see comments by A.E.Anton in a following quote). In the words of the Authoritative *Perez Vera Report, the definitive Reference to the Convention.*:

To conclude our consideration of the problems with which this paragraph deals, it would seem necessary to underline the fact that the three types of exception to the rule concerning the return of the child must be applied only so far as they go and no further. This implies above all that they are to be interpreted in a restrictive fashion if the Convention is not to become a dead letter. In fact, the Convention as a whole rests upon the unanimous rejection of this phenomenon of illegal child removals and upon the conviction that the best way to combat them at an international level is to refuse to grant them legal recognition-As a result, a systematic invocation of the said exceptions, substituting the forum chosen by the abductor for that of the child's residence, would lead to the collapse of the whole structure of the Convention by depriving it of the spirit of mutual confidence which is its inspiration. [Professor E.Prez-Vera, Hague Conference on Private International Law, Actes et documents de la Quatorzieme session, Y61.111, 1980, p. 426]

To reiterate:: a Hague Hearing is NOT the forum of determination of the `best interest' of the child. As the State Department Text and Analyses has it, on the invocation of Article 13b:

> This provision was not intended to be used by defendants as a vehicle to litigate [or relitigate] the child's best interests.

Finally, in the words of Mr. A. E.Anton, Chair of the Hague Convention:

> This is intended to be a narrow ground of refusal... this provision, therefore, would not by itself necessarily exclude a duty to return a child (International and

US Courts have taken the following positions, all unfavorable to the Respondent, on Article 13b pleadings, ruling against the exception as follows, in case after case:

A) **Brown vs Brown** (Fam.Ct.Autr.1982): ...
it is not merely a grave risk of 'any' physical or psychological harm ...the harm must be of a substantial or weighty kind.

B) **Collopy and Christodoulou** (Dist.Ct.Co, 1991)...
This provision was not intended to be used by defendants as a vehicle to litigate the child's best interests ...the person opposing the child's return must show that the risk to the child is grave, not merely serious...

C) Indeed, the US Federal Court of Appeals, 6th Circuit has held, in rapport with the intent of the Convention, that Art13b exceptions cannot be considered until one of two conditions are met:

> *First, there is a grave risk of harm when return of child puts the child in imminent danger prior to the resolution of the custody dispute..e.g., returning the child to a zone of war, famine or disease. Second there is a grave risk of harm in cases of serious abuse or neglect, when the court in the country of habitual residence may be incapable or unwilling to give the child adequate protection.*

Court will note that, granted the validity of the above, Respondent's Grave Risk pleadings are wholly out of order.

D) As Judge Garbolino of the Superior Court, Placer

County, Calif put it in Girdner &Hoff, ed. Ch.4, Selected Good Practices in International Family Abduction Cases:

> *There is a real danger for courts to exceed the scope and intent of the Convention when the defense amounts to a showing (only) of transient or reparable harm...*

This issue of transient or reparable harm is also addressed - unfavorably to the Respondent - in Slagenweit vs Slagenweit [841 F.Supp.264]. and a similar judgement was handed down in Renovales vs Roosa [1991 WL 204483, Conn. Sup. 1991]

In fact as a jurist comment on the one exception to this rule of rejecting specious Article 13b defenses, -in direct refutation of the Respondent's defense in this case - is Judge Garbolino's striking comment, made in context of Steffen vs. Severing [966 F Suppl. 922 (D.Ariz.1997)] that Respondent cites in her defense; in his words:

> *This case is troubling from the standpoint that where an abduction is carried out by a primary caretaker, the abductor may easily raise the issue of an interruption of bonding as a potential defense to return of the child. While an interruption in bonding can be a real and significant problem, its genesis is to be found in the actions of the abductor in removal of the child. On the other hand the abduction has prevented the left behind parent from an opportunity to bond,*

Indeed ***Steffen v Severing*** [966 F Supp1.922 (D.Ariz.1997)], is held up by Judge Garbolino , op. cit., as the case representing a "troubling departure" from the norm. In his comment on that

decision, he says:

> *Frankly it would appear that ` grave risk" defense should be based on better stuff. And he speaks also of a "danger in following the Steffen F case".*

Matters are stated even more succinctly in the judgment in FriedrichII (supra, 78 F.3d 1060, 1068), which again rejects the Respondent's argument forthwith:

> *A removing parent must not be allowed to abduct a child and then - when brought to courtcomplain that the child has grown used to the surroundings to which they were abducted [fn.9 - Under the logic of the Convention, it is the abduction that causes the pangs of subsequent return. The disruption of the usual sense of attachment that arises during most long stays in a single place with a single parent should not be a ` grave risk" of harm for the purposes of the Convention.].*

As Judge Garbolino, op. cit., admonishes:

> *Courts should also be wary not to deny the return of a child. where the courts or officials of the habitual residence have the ability to cope with the allegations of threatened harm, or can provide sufficient protections to obviate their effect upon the child.*

Grave Risk needs to be understood as being posed by the larger social environs of the home country not by the immediate environs of the child upon return. To cite the judgement in **Coffield** [Ohio.App.1 1 Dist. 1994, 644 N.E.2d 662]:

(this) language supports the conclusion that this exception is applicable only when the general environment of the home country poses a risk, not the specific environment on which the child will live.

As such, the psychological, or lifestyle, aspects of either parent were ruled irrelevant to an Article 13b defense, in Coffield, in tune with the intent of the Convention.

Three comments are necessary here with respect to Petitioner's case:

1.Petitioner was as much a primary caretaker as the Respondent; as such, the children's bonding was always dual, with both parents.
2. Since April 99 , Respondent has insured through brainwashing and refusal of contact with the children a sort of a deliberately contrived **debonding.**
3. The only risk to the children comes, **before, during and after the abduction,** from the chronic irresponsibility of the Respondent. In fact, the very act of abduction is itself now recognised as a form of child abuse.

Given all this, Respondent's defense, on this matter, doesn't have a leg to stand on.

Stated simply, there is not one shred of evidence that exists that can be brought forward until after the abduction, when suddenly various members of the Meyer family - who engineered the abduction - and their loyally obliging friends/neighbors in a closely knit community, form an `Indian' circle and take out affidavits to suggest that the Petitioner is a monster. Yet, even there they cannot demonstrate any risk to

the children, aside from suggesting a threat to the mother, from either Australia or the Petitioner.

On the matter of a `threat' to the Respondent - which is NOT a Hague issue [As Mr, Anton, op.cit., writes: "Apart from harm to the child, it has to be established that the Child itself, and not the abductor, would be placed in an intolerable situation "],- suffice it to say: Australia has an ample body of enlightened Family Law that protects Respondent, as would be the case in the US.

As Judge Garbolino , op. cit., sums up succinctly: .

> ...courts should be content to trust to the wisdom and experience of the courts of habitual residence to deal with the issue of the "best interests " of the child in relation to the bonding issues raised by the removing parent..

On Australia's Family Law protections, specifically, here is Justice Ewbank rejecting such defenses, in **Evans vs. Evans** [AD 1716 of 1988, 1989 IM 135J:

> Australia is a common law country and the Courts have ample powers to protect children ...the father can either take proceedings of his own accord... or he can alert the appropriate local authority in Australia and the Australian court can make whatever order is required, if any, to protect the children.

Further, As Justice Lincoln observes in **Evans vs Evan** [op.cit.J:

> In my judgement, there is a very heavy burden indeed upon a person alleged to have abducted a child in bringing himself or herself within the provisions of Article 13, and the Court should hesitate very long before it grants what is in effect an exemption from the urgency which is a characteristic of the Convention and the Act

incorporating it.

12.1 To claim that the children's unbonding with their mother is the `risk' [an idea emphatically rejected also in **Rydder vs. Rydder**: 8h Circ.1995, 49 F. 3d 369] is only to redefine for the benefit of the Court, the inherent thoughtless cruelty of the kidnapping that now, after the fact, exposes Petitioner's benighted children to such a risk; what the Respondent stands accused of can hardly, in itself, be turned into a defense without turning this into an Alice in Wonderland fantasy..One doesn't deliberately put children at risk and then claim that as a defense of the original action. On this see the judgment in Navarro vs Bullock [15FLR 1576 BNA Cal. Super. Ct. 1989] where the Court rejected such a defense, noting:

> *To retain the children in the United States guarantees that the mother will continue to frustrate the custodial and visitation rights of the father...To allow this to happen would be to allow mother to profit from her own wrong.*

Stated simply, in a civil society, kidnapping is indefensible and such removals are wrongful: both legally and morally.

12.2 Defense, in tune with the Grave Risk strategy seek to invite a psychologist to testify on behalf of the children. The irrelevance of such strategies, given the foregoing, should be clear, but they are also chided in Case Law. In **Tahan vs. Duquette** (App.1992, 259 N.J.Super. 328 [613 A.2d 486] the Court held that proposed testimony of such kind was ***irrelevant*** to the determination under Article 13(b).

> *We agree with the trial judge that the Article 13b inquiry was not intended to deal with issues or factual questions which are appropriate for consideration in a plenary*

custody proceeding. Psychological profiles, detailed evaluations of parental fitness, evidence concerning lifestyles and the nature and quality of relationships all bear upon the ultimate issue. The Convention reserves these considerations to the appropriate tribunal in the place of habitual residence. [Id at 333, 613 A.2d. at 489]

In the judgment offered in **Re Coffield** (Ohio App. 1 1 Dist 1994), Judges Ford, Christley and Nader quote the above passage approvingly arguing that:

In interpreting Article 13, the Courts in this country have expressly held that the scope of a trial court's inquiry under the grave risk exception is extremely narrow.

As Judge Garbolino caps it:

As with the other defenses under the Convention, even though a defense of grave risk is established, the court is still not required to deny the petition, and the court may exercise its discretion to order the child returned.

In **Escudero v. Tice -Menley** [58 F.3d 374 8th Circuit, 1995] allegations of similar risk to the child were rejected outright by Court. Once again, the entire programmatic thrust of the Hague Convention is to return a child to its habitual residence; judicial discretion needs to tilt in favor of that presumption against the weight of contrived defenses. As The Perez- Vera Report explains it, in Para 113:

In general it is appropriate to emphasize that the exceptions in the two articles do not apply automatically in that they do not invariably result in the child's retention ...the very nature of these exceptions gives judges a discretion - and

does not impose upon them a duty - to refuse to return a child

To cite Judge Garbolino again:

Even though some degree of psychological damage may be expected from a return of a child, the return of a child should not be denied...

In point of fact, even in the context of charges of severe forms of abuse, which is NOT the issue in this case, including sexual exploitation, Courts have still returned the child as per the Convention (See **Pacicca vs. Pacicca**, 042/260/93 Nelson, NZ and **Escudero v. Tice Meney** 58 F.3d 374 8`h Circ. 1995) which holds that local jurisdictions in country of habitual residence are more than competent to deal with such matters In sum, the Grave Risk Defense is simply inapplicable given the facts presented in Respondent's Memorandum who have profoundly misread the 13b defense; the issues raised are really matters pertaining to custodial, rather than jurisdictional (i.e. Hague) issues, and as such fall outside the scope of the present litigation. They belong not in this, but in the next forum, after the Hague issue is resolved.

XIII. Respondent's Case Law Citations

The Case Law cited by Defense mainly to DENY the family's Habitual Residence in
Australia is also quite counterproductive:
13.0 For starters, **Evans vs Evan Feder** which is cited by defense has only one
minor problem with it: **the decision was reversed upon appeal!; apparently the research by defense did not go far**

enough! Indeed this error is egregious enough to warrant dismissal of case for defense since a full five or so pages of the record are taken up by discussion of that case.
Here is the verdict of the US Court of Appeals, Third Circuit (3rd.Circ.1995:63 Fed. 3d 217) which **reversed** the original decision, who had this to say about the original judgment seized upon in undue haste by defense in this case:

> *In rejecting Australia, the court placed undue emphasis on the fact that the majority of Evan's years had been spent in the United states, ignoring the approximately six months that Evan lived in Australia immediately preceding his return to the United States ...moreover the court disregarded the present, shared intentions of both Mr and Mrs Feder with regard to Evan's stay in Australia focusing instead on Mrs Feder exclusively and on the facts which indicated that she did not wish to remain in Australia...*

Once again , highly significantly, the focus of the Hague is on the child not the parents.; and even six months was enough for the court to treat as constitutive of Habitual Residence even though Evan had lived the major part of his life in the United States.

13.1 So important was this reversal of judgement that now this case is held up as the archetypical case establishing ordinary residence as habitual residence. As Katherine Hung writes about the case (There's No Place Like Home: Determining Habitual Residence: Feder vs. Evans Feder, in 26 Ga. J.Int'l &Comp.L.487 (1987):

> **In Friedrich and Ryder** the courts interpreted **Re Bates** to mean that "there is no real distinction between ordinary residence and habitual residence". Based on this

interpretation, Evan's habitual residence at the time his mother took him back to the United States was his "ordinary residence" -the place he had been living for the previous six months. Without question, Evan's ordinary residence and thus his habitual residence was Australia. Therefore the District Court's finding that Evan's habitual residence was the US was clearly erroneous and the appellate court was correct in overruling the finding.

13.2 In the case of Petitioner's children, they easily satisfy the temporal requirement having lived, given their tender ages, over 75% of their socially aware time overseas, in Australia, between ages of 1-3 for the baby and 4-6 for the older child. Their ordinary residence was Australia between 1997-1999: From July 97 to April 97 in the first instance; and from July 98 to the time of Wrongful Removal in the second.

13.3 **The Ponath** case that is cited by defense is not applicable here because:

a) the parents in that case separated juridically in Germany prior to the removal of the child
b) the abducting mother was coercively held in Germany against her will.

In contrast, in the Petitioner's Case:

a. almost all Petitioner's Australian affidavits testify to a happy family; almost all in Australia were shocked when the Respondent vanished unannounced.
b, More importantly, letters and cards written by Respondent right up until the last day speak only of eternal love which is hardly indicative of a state of incarceration. (Exhibits cited already)

c. Respondent had interviewed with the Chair of the Department of Economics at the University of New South Wales and received a job offer in 98 which was to be renewed again in March of 99 (Exhibit 17).

d. There had been no family law complaint ever in the marriage, whether in Utah or Australia, let alone a legal separation.

e. Litigants had travelled to Australia twice, spending 18 months altogether, being seen off at the airport each time by Respondent's family, who could easily have applied restraint had coercion been ever implied.. Clearly the cleverly orchestrated abduction opera amply reveals Respondent's family had both the will and the means to help out had they been complained to by the Respondent in the 18 months prior to the removal.

This is hardly `clear and convincing' evidence of a coerced stay in Australia.!

13.4 To cap it, defense makes much of the fact that Petitioner's family vacations in the US were up to 3 months long which they claim is longer than usual vacations thereby hoping to seal the case for the US being the Habitual Residence. The error is understandable; few lawyers can be supposed to take 3 month vacations. On the other hand academics work on 9 month contracts and get summers off in their entirety. The error, though not condonable, is comprehensible.

XIV. Further Case Law Support for Petitioner

14.0 The Case that strongly supports the Petitioner is Walton vs. Walton (S.D.Miss.1996 925 F.Suppl. 453), presided over by Judge Russell, oddly enough involving Australia as well.In this case, the child was born in the US, and despite acknowledged

marital difficulties the family moved to Australia, with the child about 3 years of age, to Penrith , NSW, Australia, first ,where they lived 6 months , and then to Brisbane where they spent a year. The marriage worsened and both parties engaged lawyers and sought assistance of family court in Australia. The mother withdrew kids from school, applied for new passports and departed , unannounced, for the US. The child, similar to Petitioner's, had spent the last 18 months in Australia, and yet had been born and raised in the US. The Court under Judge Dan Russell, op. cit, went principally by settled purpose based
on the father's job offer from Australia, despite the following caveats:

> *1. charges of marital discord; complaints in family court, and retention of counsel while in Australia.*
>
> *2. fact of father's confiscation of passports (mother issued new passports)*
>
> *3 obvious degree of spousal coercion implicit in confiscation of passports.*
>
> *4. and even more importantly the father's explicitly expressed wishes to return to the US twice in his stay in Australia, even informing his employer on one occasion..*

None of these out of the ordinary parental actions deterred the Court in the case from seeing Australia as the Habitual Residence of the child. averring that ordinary residence.
is habitual residence regardless of parental intentions, accords or discords; after the fact of taking up new residence.

Judge Russell, in his judgment on the case, cites **Friedrich** with approval; I quote:

> *The rights and wrongs of the actions of the respective parents are not before us for disposition on the merits* (Friedrich at 1402).

In contrast to the case outlined above, in the Petitioner's Case, there has never been any legal complaint in this marriage, indeed Respondent testified to her undying love to the last; finally she left with the original passports surreptitiously signing off on Petitioner's checks in process. Obviously the alleged coercion was not very effective!

Walton vs Walton *is important because it lives up to the expectation of the Convention: and supports the Petitioner quite dispositively - once established in a hew environs, changes of hearts and minds (whether regarding the marriage itself, or employment, etc) with respect to future intentions of either parent is irrelevant to the case: it is the child's residence for the duration that the Hague focuses on.*

14.1 Other Case Law that similarly and strongly supports Petitioner is the classic **Re.Bates**, and **Feder II** cited already.

14.2 Also, more recently, **Mozes vs Mozes** (DC California 1998 19 F.Supp.2d 1108) where children born and brought up in Israel, who had lived but fifteen months in Los Angeles were seen as habitual residents in the US, which provides a close parallel to Petitioner's case and again gainsays the arguments of the Respondent. As Judge Paez put it: in his judgment in the case:

> *The purpose of the Convention is to preserve the status quo and to deter paren is from crossing international boundaries in search of a more sympathetic court... the Convention is designed to restore the factual status quo which is unilaterally altered when a parent abducts a child and aims to protect the legal custody rights of the non-abducting parent.*

Citing a similar ruling in **Falls vs Downie** (871. F.Supp. 100, 102 D.Mass. 1994) approvingly Judge Paes (op.cit) had this to say:

> *... although the two and a half year old child had been living in the United States for only eight months, the child's habitual residence was the United States.*

Matters are cut even finer when Judge Paes also cites **Re.S.** (A Minor. 1991, 2 F.L.R. 224) in his judgement, where to quote:

> *One English Court held that a child who was sent from Canada to stay with her father in Minnesota for a school year was habitually resident in Minnesota when removed by her mother after only four months.*

14.3 In **Shalit vs Shalit** (D.Alaska 1998. Case No. A98-328 CV (JWS), another case in point, the judgment of the Court, affirming the same principle, cites the Restatement (Third) of Foreign Relations Law approvingly that says:

> Habitual Residence should be interpreted in light of the policy of deterring child-snatching. In general, a child is considered to have acquired a habitual residence in a state by living therefor at least six months ....

Court will note, in context, that Petitioner's children lived in Australia - not merely resided there - for a full 18 months with a break in between. The situation clearly satisfies the requirements for habitual residence as outlined above. To cite Judge Paes again:

> *The fact chat a child is to remain indefinitely in a new forum may strengthen the argument ...yet it is not a necessary condition for establishing the habitual residence of a child*

As such, in conjoint force, mainstream judicial opinion, expert commentary, and actual case law, supports the Petitioner's

claim and disavows Respondent's defense quite conclusively. In sum::

a) *the Kanth family were ordinarily, legally, and in terms of immigration status, residents of Australia until March 25`h of 99 when the peace of the children's ordinary or habitual residence in Sydney was shattered by the abusive, and abhorrent, act of abduction*

b) *Pursuant to the Australian Family Law Act, Petitioner had full, though join rights of custody*

c) *As such, the Removal was Wrongful as per the Convention carrying the requirement of a Return of Children to the Petitioner.*

XV Conclusion

Article 11 requires that a decision be reached expeditiously; the children were abducted in March 25th the Hague Petition was filed in Australia on May 14`t', and in the US on July 8`h, and now it is November with the Hearing still some weeks away. As such, Petitioner respectfully prays that Court orders the immediate and unconditional return of Petitioner's children. There has been far too much suffering here on the part of the nonoffending members of this family, with grievous harm extant in the enforced severance of intimate bonding between father and children - if there has ever been any grave risk in this case it would fall within this domain - since the abduction. The children are entitled to their customary way of life; and their right to filial contact, and Petitioner needs to return to the challenge of his career destabilized by the trauma of abduction. Article 13 also makes a fleeting reference to the social background of the child as an occasional factor to consider, if

only under certain circumstances.. Given the process of ethnic cleansing that Petitioner's children have been submitted to (details in Exhibit already cited) since the abduction - being placed in a local Sunday school (where it is to be hoped the teachings include the 11th commandment: ***thou shalt not abduct thine own children!)*** with traces of their part Indian cultural heritage sytemically disparaged - lends even more urgency to restore them to their customary conditions of a literate, cosmopolitan, and humane existence.

Further, as per Article 26, Petitioner prays that all of his gratuitous, and horrific, legal expenses since March 25t' be borne by whomsoever has been paying Respondent's legal bills.

DATED this . . . . . day of November, 1999

Professor Rajani Kanth
Petitioner

Certified that a True Copy of this **Reply** has been mailed by first class mail to Counsel for Respondent on Nov.6th, 1999.

Professor R. Kanth

APPENDIX 'L'

Details of Job Offers From Australian University Indicating it's Permanency

School of Finance and Economics
Head of School
Chris Terry
PO Box 123
Broadway NSW 2007
Australia

Tel. +61 2 9514 7710
Fax +61 2 9514 7711
Email Chris.Terry@uts.edu.au
http://www.bus.edu.au

UTS
University of Technology, Sydney

4 November 1999

To whom it may concern -

Dr Rajani Kanth commenced a three-year renewable appointment with the School in July 1998. He was advised to apply for a permanent visa because this provided him and his family with access to the public medical-care system.

He subsequently advised me that the Immigration Department had issued him with a temporary visa due to a mistake.

Yours sincerely

Chris Terry

Witnessed by Peter Rosencrick

Justice of the Peace

4th November 1999.

School of Finance and Economics
Head of School
Chris Terry
PO Box 123
Broadway NSW 2007
Australia

Tel. +61 2 9514 7710
Fax +61 2 9514 7711
Email Chris.Terry@uts.edu.au
http://www.bus.edu.au

UTS
University of Technology, Sydney

4 November 1999

To whom it may concern

Dr Rajani Kanth applied for a three-year renewable position with the School in November 1997. Following several rounds of interviews the Deputy-Vice Chancellor of the University formally offered him the position on 19 February 1998.

Dr Kanth commenced duty at UTS in July 1998. He told me that he needed to take his wife (and family) back to the USA in the first half of 1998 to allow her to recover from the trauma of an assault that she had suffered while shopping in Kensington.

The School assisted the family to find temporary accommodation when they returned in July. Dr Kanth told me that he wanted to reside near the School his daughter has attended in 1997. Property values are high in this part of Sydney and renting for a period would be a logical form of initial accommodation.

Recently, the University decided to consider converting

contract positions into continuing positions and the School has recommended that six months prior to completing his contract Dr Kanth be considered for conversion to continuing. (At UTS, appointments are continuing rather than tenured.) Conversion is on the basis of satisfactory service and is determined by a committee established by the University.

Dr Kanth is currently on leave without pay. I recommended this leave on compassionate grounds, to allow him to return to the USA to resolve his family difficulties. My expectation is that he will return to his position at UTS.

Yours sincerely

Chris Terry

Witnessed by Peter Robertson

Justice of the Peace

4/11/99.

Office City campus, 645 Harris Street, Ultimo 2007
Campuses City, Kuring-gai, St Leonards

APPENDIX 'M'

Family Court of Australia
Application for Custody

FAMILY COURT OF AUSTRALIA

Application for

271878

Final orders

Form 7 – Family Law Rules Order 8 rule 3

(Not to be used for interim or procedural orders)

A	File Number	5-1533/99
B	Filed at / Filed on	
C	Place for directions hearing	97-99 Goulburn St. Sydney
	Hearing date / Hearing time	16-7-99 9:55 AM PM

Notice to the respondent(s)

If you oppose the orders sought in item 7 OR want the court to make a final order of your own you must

- ☐ file with the court a Response (Form7A), and
- ☐ serve a sealed copy of the Response on the applicant(s) at least 7 days before the directions hearing in Box C above, and
- ☐ attend the directions hearing.

A Details of parties

		Applicant 1	Respondent 1
1	Full name	KANTH RAJANI KANNEPALLI	KANTH CORY LEIGH
2	Date of birth	08.02.1949	08.09.1965
3	Citizenship, etc	Is present in Australia Is ordinarily resident in Australia	
4	Marital or parental status in these proceedings	Husband	Wife

B Addresses

5 (a)	Postal address for service of documents on applicant(s)	send to solicitor in 5(b)
(b)	Solicitor for applicant(s)	JANE HOBSON TURNER WHELAN Code: A74Q Suite 2, Level 2, 162 Goulburn Street, East Sydney NSW 2010 Tel: (02) 9261 3122 Fax: (02) 9261 1250 DX 211 SYDNEY
6	Postal address of respondent	2736 East 7305 South Salt Lake City Utah, USA 84121

DATE 9 JUNE 99 TIME 9:28 PM
BY 2736 E 7305 S
UPON
CONSTABLE RIVE, SALT LAKE COUNTY, UTAH

MIDIVARE 3000973

M1

BEST AVAIL

C Final orders sought by applicant(s)

7 State briefly but precisely what orders you seek	see annexure 7C

D Relationship details

8 Date cohabitation of applicant and respondent commenced (if applicable)	N/A
9 Date of marriage (if applicable)	.03.1992
10 Town/city and country of marriage (if applicable)	Salt Lake City Utah, United States of America
11 Date of final separation (if applicable)	25.03.1999
12 Date divorce became absolute (if applicable)	

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ANNEXURE "C" - Final orders sought by applicant(s)

1. That the children namely Malini Amatel Kanth born 1 April 1993 and Anjana Kesari Kanth born 20 February 1996 reside with the Applicant Father.

2. That the Respondent Mother have reasonable contact to the said children.

3. Such further or other Orders the Court deems fit.

4. The Respondent Mother pay the Applicant Father's costs of an incidental to this application.

M3

E Children

		child 1	child 2
13	Details of each child - full name	KANTH MALINI AMSTEL	KANTH ANJANA KESARI
	- date of birth	01.04.1993	20.02.1996
	- sex	Female	Female
	- full name of mother	KANTH CORY LEIGH	KANTH CORY LEIGH
	- full name of father	KANTH RAJANI KANNEPALLI	KANTH RAJANI KANNEPALLI

		child 3	child 4
	- full name		
	- date of birth		
	- sex		
	- full name of mother		
	- full name of father		

14	Particular State or Territory law relied on	Not applicable
15	Statement of Claim	Not applicable

G Other court proceedings and orders

16	Are there any family law, domestic violence or child welfare proceedings pending, orders sought, orders made, undertakings to a court or registered agreements concerning a party or child listed above?	MA

H [illegible]

Signed	Solicitor for applicant(s)	Date
	JANE HOBSON	3 16 199

This application was prepared by JANE HOBSON, Solicitor.

I [illegible]

I gave the applicant(s) a copy of the Family Court brochure *Marriage, Families and Separation* ☒

I gave the applicant(s) a copy of the Family Court's mediation services brochure *Pathway to Agreement* ☒

Signature of solicitor	Print full name	Date
	JANE HOBSON	3 16 199

990682

Affidavit of service

Form 22 - Family Law Rules Order 18 rule 15

A	File Number	5-15325/99
B	Filed at (court use only) Filed on	97-99 Goulburn St Sydney
C	Hearing date	16-7-99 9.55

1	Party on whose behalf this document is filed	KANTH	RAJANI KANNEPALLI
2	Name, address and occupation of person serving documents	Orson P. Madsen	Deputy Constable
		7304 So. 300 W Suite 203 Midvale, Utah 84047 USA	postcode
3	Person served	KANTH	CORY LEIGH
4	Date documents served	9 June 1999	
5	What documents were served?	(a) Copy of application for Final Orders stamped with the Court seal (b) Family Court brochure *Marriage, Families and Separation* (Order 25 rule 3)	
6	How were they served on the person?	I handed them to the person at 2736 E. 7305 So. Salt Lake City, Utah 84121	

Asked if person was Cory Leigh Kanth

I swear/affirm that the facts set out are true.

Signature

Sworn/affirmed

Place: 7304 So 300 W #203 Midvale Utah Date: 9 June 1999

Before me (signature of witness)

Full name of witness (please print)

Robert J. Reitz

Justice of the Peace [illegible] specify Notary Public

Page 1

MIDWARE 3006975

M6

I, ORSON MADSEN
being first duly sworn on oath and say: I am a duly appointed Deputy Constable, SALT LAKE County, State of UTAH, a citizen of the United States over the age of 21 years at the time of service herein, and not a part of or interested in the within action

I received the within and hereto annexed,
APPLICATION FOR FINAL ORDERS (FORM 7- FAMILY LAW RULES)
& MARRIAGE, FAMILIES & SEPARATION BROCHER

on June 08, 1999 , and served the same upon
CORY LEIGH KANTH

a within named Defendant in said article(s) by serving a true copy of said article(s) for the defendant with

CORY LEIGH KANTH (PERSONALLY)
a person of suitable age and discretion there residing at
2738 E 7300 S, SOUTH SALT LAKE
his/her usual place of ABODE. on June 08, 1999

I further certify that at the time of service of the said article(s), I endorsed the date and place of service and added my name and official title thereto.

on June 08, 1999

Deputy SL 982

ROBERT J. "BOB" REITZ, CONSTABLE, SALT LAKE County
7304 SOUTH 300 WEST SUITE 203, MIDVALE, UTAH 84047, 255-5468

NOTARY FEE:	5.00
MILEAGE CHARGE:	15.00
SERVICE CHARGES:	6.00
TOTAL CHARGES:	$26.00

NOTES

SUBSCRIBED AND SWORN TO BEFORE ME ON THIS 11th DAY OF June, 1999.

NOTARY PUBLIC

Notary Public
ROBERT J. REITZ
7304 South 300 West, Suite 203
Midvale, Utah 84047
My Commission Expires
January 15, 2000
State of Utah

Supreme Court, U.S.
FILED
MAY 29 2001
OFFICE OF THE CLERK

No. 00-1630

In The

Supreme Court of the United States

PROFESSOR RAJANI KANTH,

Petitioner,

vs.

CORY LEIGH KANTH,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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OR CALL COLLECT (402) 342-2831

LIST OF PARTIES

The caption of the case contains the names of all parties.

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STATEMENT OF THE CASE

A. NATURE OF THE CASE

Petitioner commenced these proceedings under the *International Child Abduction Remedies Act*, 42 USC § 11601-11610 (referred to herein as "ICARA") (Appendix Exhibit "A," Pages 1 to 9), which Act implements the *Convention on the Civil Aspects of International Child Abduction* (sometimes referred to as the "Hague Convention" or the "Convention") (Appendix Exhibit "B," Pages 10 to 23). The Petition alleges that the removal of the children from Australia was wrongful because that was the state of habitual residence at the time of removal, under the terms of the Hague Convention. Cory Kanth, the Respondent, replies claiming that the United States is the habitual residence and therefore there was no wrongful removal.

B. THE COURSE OF THE PROCEEDINGS AND DISPOSITION BELOW

Mrs. Kanth returned to the State of Utah with the parties' two minor children on March 25, 1999. The Petitioner commenced this action on July 8, 1999. An evidentiary hearing was scheduled for August 24, 1999. At that hearing the parties' settlement which called for the dismissal of the Petition was read on the record and approved by the Court. The Petitioner, though present in Salt Lake City, Utah, did not attend the hearing. Rather, his two attorneys approved the Stipulation. The parties also took advantage of the opportunity to make a record of their settlement of other issues that did not pertain to

the Petition before the Court. These issues involved the parties' divorce. It was clear that the Court was not approving or disapproving the Stipulation but, merely, permitting the parties to make a record of their agreement.

Professor Kanth subsequently discharged his attorneys and appearing *Pro Se* and moved to set aside the Stipulation and Order which motion was granted on October 18, 1999. The matter was set for evidentiary hearing for December 9, 1999. Prior to the hearing the parties were ordered to proffer their case by affidavit and documentary evidence and to allow for the cross examination of all affiants who reside in the United States. Just prior to the December hearing the Petitioner moved to continue the matter, again, and in lieu thereof waived his right to a hearing. The case was decided on the record including the Petitioner's deposition. The Court entered its "Order" December 14, 1999 finding that the Petitioner had failed to establish wrongful removal of the children by the Respondent because the Petitioner had failed to show that Australia was the state of habitual residence of the children. (Order, dated December 14, 1999, Docket No. 68).

C. STATEMENT OF THE RELEVANT FACTS

1. The parties are both citizens of the United States. (Affidavit of Respondent, dated August 18, 1999, ¶ 4, p. 2, Docket No. 26, attached as part of Respondent's Appendix, hereinafter referred to as "Respondent's Affidavit I"). The parties are husband and wife having been married in

Salt Lake City, Utah March 6, 1990. (Respondent's Affidavit I, ¶ 2, p. 2. Docket No. 26). The parties have two children of the marriage, Malini, born April 1, 1993 and Anjana, born February 20, 1996. (Respondent's Affidavit I, ¶ 3, p. 2, Docket No. 26). The Kanth family purchased a home and lived continuously in Salt Lake City, Utah through June 1996. (Petitioner's Affidavit, ¶¶ 3-5, Exhibit A, Part 2 of Petitioner's Memorandum, Docket No. 9).

2. In 1993, Professor Kanth was denied tenure at the University of Utah. He desperately searched for employment in the United States as a professor, sending out between 90 to 150 resumes to various colleges and universities. However, Professor Kanth was unsuccessful. Therefore, shortly following the birth of Anjana, Professor Kanth accepted a temporary academic position with the University of Aarhas in Denmark. (Petitioner's Affidavit, ¶ 5, Exhibit A, Part 2 of Petitioner's Memorandum, Docket No. 9, Respondent's Affidavit I, ¶ 12, p. 4, Docket No. 26). Professor Kanth left for Denmark on June 28, 1996 without Mrs. Kanth or the children. They remained in Utah and later joined him on September 24, 1996. (Respondent's Affidavit I, ¶ 5, pp. 2 & 3. Docket No. 26). Mrs. Kanth and the children left Denmark on April 16, 1997 without Professor Kanth and returned to Salt Lake City, Utah. Upon their return to Utah, Mrs. Kanth enrolled Malini in preschool. She made many friends and excelled in school. (Respondent's Affidavit I, ¶ 43, pp. 19 & 20, Docket No. 26).

3. Professor Kanth joined his family in Utah on June 3, 1997. He immediately began looking for employment as a professor at colleges and universities in Utah, and, alternatively, throughout the United States. He sent out

hundreds of resumes to American schools over several months.

However, he was once again unsuccessful in finding a job in the United States. (Respondent's Affidavit I, ¶¶ 5, 12, pp. 2 & 3, 4 & 5, Docket No. 26). He did receive a six-month appointment at the University of New South Wales in Australia. Neither Mrs. Kanth nor the children wanted to move. They voiced their opposition to Professor Kanth on several occasions. However, because of the family's precarious financial situation, Professor Kanth accepted the position. He told Mrs. Kanth it would only be for six months and could lead to a position in the United States. On this basis, Mrs. Kanth agreed to accompany him with the children. (Respondent's Affidavit I, ¶ 19, p. 7, Docket No. 26).

4. The Kanth family obtained a temporary visa and arrived together in Australia on July 17, 1997. They left all of their furnishings and personal belongings, other than a limited amount of clothing, in storage in Salt Lake City, expecting to return within six months. (Respondent's Affidavit I, ¶¶ 5, 13, pp. 2 & 3, 5 & 6, Docket No. 26). During their first three weeks in Australia, the family stayed in a temporary lodge. They later rented a fully-furnished apartment for which they signed a six-month lease. (Respondent's Affidavit I, ¶ 73, p. 28, Docket No. 26).

5. While in Australia, Professor Kanth's controlling and abusive behavior toward Mrs. Kanth worsened. He threatened to "kick [her] teeth in" when he discovered she bathed the children without his permission. He refused to allow her to choose the childrens' clothing. He

called her derogatory names in front of the children, such as "squaw," "Avon lady," "low class," and "idiot." He stood over her when she brushed the children's hair and angrily grabbed the brush from her hands if either said "ouch." He allowed her to leave the house only to take Malini to and from school and to buy groceries. (Respondent's Affidavit I, ¶ 47, p. 21, Docket No. 26). While the family was in Australia, Professor Kanth continued to search for employment in the United States. He failed to obtain any offers. The family had no money to return to the United States. Therefore, when the University of New South Wales offered him a six-month extension, he accepted. (Respondent's Affidavit I, ¶¶ 21, 22, pp. 8 & 9, Docket No. 26).

6. Because the family's six-month lease on their first apartment expired, they found alternative housing. They signed another six-month lease but broke it early to return to Salt Lake after three months. (Respondent's Affidavit I, ¶ 21, p. 8, Docket No. 26). During their entire stay in Australia, Professor Kanth kept control of each family members' passport. (Respondent's Affidavit I, ¶ 21 p. 8, Docket No. 26). Professor Kanth did not complete his second six-month term with the University of New South Wales. He, instead, returned with Mrs. Kanth and the children to the United States on April 6, 1998 in search of employment there. (Respondent's Affidavit I, ¶ 22, pp. 8 & 9, Docket No. 26). The return to Salt Lake City in March 1998 was intended to be a permanent relocation to Salt Lake City. The return to Salt Lake City was occasioned due to the Petitioner's insistence and the parties' mutual dissatisfaction with their life in Australia. (Affidavit of Respondent, dated November 30, 1999, Docket No. 63,

attached as part of Respondent's Appendix, hereinafter referred to as Respondent's Affidavit II, ¶¶ 8-12, pp. 3 & 4). Mrs. Kanth again enrolled Malini in preschool. She and Anjana reunited with several friends and enjoyed playing with them. (Respondent's Affidavit I, ¶ 23, pp. 9 & 10, Docket No. 26). Professor Kanth looked at several apartments in Salt Lake, where he also made many job inquiries. (Respondent's Affidavit I, ¶ 23, pp. 9 & 10, Docket No. 26).

7. Professor Kanth was again unable to find employment as a professor in the United States. He, therefore, accepted a position previously offered to him at the University of Technology, Sidney. (Respondent's Affidavit I, ¶ 23, pp. 9 & 10, Docket No. 26). Professor Kanth was never satisfied with the position at the University of Technology, Sydney (UTS). This position was that of a lecturer and he considered it a "step down" from his earlier position at the University of New South Wales. (Respondent's Affidavit II, ¶ 17, pp. 6 & 7, Docket No. 63). Professor Kanth's disappointment and dissatisfaction with his UTS position is supported by E.K. Hunt, Economics Professor and Chair of the Department of Economics, University of Utah, who states:

> " . . . UTS (University of Technology of Sydney) is a new college that was until recently a technical school. Employment at that school would generally be regarded by most academics as one of the least desirable positions in the academic world." (Affidavit of E.K. Hunt, November 30, 1999, Docket No. 22, p. 1).

8. Mrs. Kanth again objected to going back to Australia. However, Professor Kanth assured her that a position at Duke University would come through and the family would only be in Australia, for two months at the very longest. Professor Kanth agreed that in the event the position at Duke did not materialize, Mrs. Kanth would return to Utah with the children. Based upon these representations, Mrs. Kanth agreed to again accompany him. (Respondent's Affidavit I, ¶¶ 24-25, p. 10, Docket No. 26). The family was scheduled to leave for Australia on July 5, 1998. However, none of them wanted to go. They loaded the few suitcases they packed into a van but decided not to leave. The next day, Professor Kanth determined the family would have to go. He told them to put their bags into the car. They left so quickly between the time he made the decision and the time they left that they barely had time to reload their bags. The family left reluctantly for Australia on July 6, 1998. Their property again remained in storage. (Respondent's Affidavit I, ¶ 29, pp. 11 & 12, Docket No. 26). When they arrived, they negotiated a six-month lease for a fully-furnished home that included a car. That was the shortest lease period the Kanth's were able to obtain. (Respondent's Affidavit I, ¶ 29, pp. 11 & 12, Docket No. 26).

9. Professor Kanth's abusive behavior toward Mrs. Kanth worsened. He monitored Mrs. Kanth's time very closely. He only taught school two evenings a week and was at home the rest of the time. He allowed Mrs. Kanth to leave the home only with his permission, only for a reason acceptable to him and only for a specified time. The infrequent occasions she was allowed to leave, he became enraged if she was not home at the precise time

he calculated she should arrive. (Respondent's Affidavit I, ¶¶ 48-49, pp. 21 & 22, Docket No. 26). Professor Kanth completely controlled the family's money. He refused to give Mrs. Kanth money for anything but necessities, such as groceries or school expenses for the children. The money he gave her for these things was minimal. When she returned from shopping, Professor Kanth compared the amount she had spent with the amount of money he had given to her. He required her to give him any change. (Respondent's Affidavit I, ¶ 48, pp. 21 & 22, Docket No. 26).

10. Professor Kanth gave Mrs. Kanth no money with which to open a checking account and, because of a bankruptcy he filed in their names several years earlier, she was unable to obtain a credit card. (Respondent's Affidavit I, ¶ 48, pp. 21 & 22, Docket No. 26). On August 29, 1998, Professor Kanth discovered that Mrs. Kanth had bathed the children while he was at work. He became enraged and told Mrs. Kanth she "couldn't be trusted," and that he would "have to figure out what to do about it." Mrs. Kanth asked Professor Kanth to allow her to return to the United States with the children, as he earlier promised and file for a divorce. He told Mrs. Kanth in front of the children that she was "nothing but a squaw" and he would "rather shoot myself in the head than allow you and your family to raise these little girls." (Respondent's Affidavit I, ¶ 42, pp. 18 & 19, Docket No. 26).

11. The Kanths never planned to look for a house because they intended their stay to be temporary. (Respondent's Affidavit I, ¶ 74, p. 28, Docket No. 26). The children were isolated. The few extracurricular activities in which they participated were minimal. Malini took

only three music lessons and one ballet lesson the entire time they lived in Australia. (Respondent's Affidavit I, ¶¶ 65-66, p. 26, Docket No. 26). None of the jobs in the United States materialized. Professor Kanth, however, continued to refuse to allow Mrs. Kanth and the children to return, as he promised. Malini repeatedly stated she wanted to go home and asked on several occasions when they would return to Utah. (Respondent's Affidavit I. ¶ 32, p. 13, Docket No. 26). In January 1999, Professor Kanth received an offer of temporary employment from a university in Singapore. Singapore is not a party to the Convention. Mrs. Kanth became worried about Professor Kanth's threats that he would not allow her to raise the children. She feared that Professor Kanth would retain the children and she would lose any legal rights she might have to them. (Respondent's Affidavit I, ¶¶ 33-34, pp. 13 & 14, Docket No. 26).

12. Professor Kanth suggested that she and the children return to the United States while Professor Kanth tested the Singapore job. Professor Kanth told Mrs. Kanth that "his" children would never again enter her parent's home except with him there. He stated that their children would be better off in India around "proper" people and the children. India is not a party to the Convention. (Respondent's Affidavit I, ¶¶ 33-34, pp. 13 & 14, Docket No. 26).

13. Professor Kanth traveled to Utah on April 3, 1999. He did not appear to be upset that Mrs. Kanth and the children had left. He seemed relieved to be back in the United States. He never demanded that the children return to Australia. (Respondent's Affidavit I, ¶¶ 35 & 36, pp. 4, 7, 5, Docket No. 26). Professor Kanth resumed

searching for employment in Utah and the United States. When he was again unsuccessful, he returned to his job at the University of Technology, Sydney, on April 22, 1999. (Respondent's Affidavit I, ¶ 37, pp. 15 & 16, Docket No. 26).

14. Professor Kanth always kept a mailing address in Utah. He obtained a post office box and later listed Mrs. Kanth's parents' residence as his own on numerous receipts and applications while in Australia. (Respondent's Affidavit I, ¶ 15, p. 6, Docket No. 26). Professor Kanth maintained his Utah driver's license and eligibility to vote while abroad. (Respondent's Affidavit I, ¶ 15, p. 6, Docket No. 26). While in Australia, the children visited doctors for various childhood illnesses. They did not have one doctor in Australia but saw several for various illnesses. (Respondent's Affidavit I, ¶ 51, p. 22, Docket No. 26).

15. During the pendency of this Petition, as early as June 1999, Professor Kanth accepted a one year teaching position at Wagner College in New York. The Petitioner failed to disclose this new contract and teaching position as well as his intention to return to the United States until sometime after the initial hearing was scheduled. It was only when it would be too difficult to conceal his whereabouts that he disclosed his relocation. The Petitioner stated many times that he believed even one semester at a "state side" university or college would give him the opportunity to seek something more permanent in the United States. (Respondent's Affidavit II, ¶¶ 37, 40, pp. 10 & 11, Docket No. 63).

16. The Petitioner has now accepted yet another position, this time in Singapore, according to his current notice of change of address on file herein.

REASONS FOR DENYING THE WRIT

The Petitioner does not present an issue which would support granting a Writ of Certiorari. The Petitioner merely restates his factual and legal argument made below. The Petitioner does not martial the evidence which would support the ruling of the District Court and the Tenth Circuit Court of Appeals. After considering the facts as they relate to: (1) the intent of the parties; (2) the time involved; and (3) the geography, the Court concluded that the United States was the State of habitual residence for the Kanth children. The question is one primarily of the parties' intent. This is particularly the case where the visit was for a period of less than one year.

The parties behaved as though the visit to Australia was meant to be temporary. All of their personal furniture and effects were left behind in Utah. The parties maintained a Utah address and all other legal attachments (e.g., drivers licenses, mailing address, voter registration, etc.). The parties were used to frequent and temporary moves. The parties and their children moved seven times while in Australia. The children never acclimatized to Australia.

The Petitioner emotionally abused and physically controlled the Respondent. The physical control was accomplished by way of physical abuse, threats and

financial control. This extended the parties otherwise temporary stay in Australia. All during the temporary stay in Australia the Petitioner desperately sought employment in the United States. Finally, after commencing his Petition, the Petitioner moved to New York having taken a teaching position there only to subsequently move to Singapore where he currently resides.

After Ms. Kanth returned to Utah with the children, Professor Kanth indicated his acquiescence to the move. This occurred in the form of letters written by Professor Kanth. Even if Ms. Kanth's return was "wrongful" in the first place, Professor Kanth's acquiescence constitutes a complete defense to his claim pursuant to the Hague Convention.

The other reasons sited by the Petitioner are disingenuous. The Trial Judge was gracious in extending to Professor Kanth opportunity after opportunity to retain counsel, to appear personally in Court, and to generally comply with the Court's orders. Professor Kanth was finally given an opportunity to appear at the trial but instead he requested a continuance. Professor Kanth agreed with the Court for the Court to resolve the case based upon the written record without his appearance. Professor Kanth waived his right to a hearing. (Petitioner's Appendix "C," 2, footnote 1). Professor Kanth had ample time to secure new counsel but was not represented by counsel because he either delayed or was disingenuous in making the request in order to secure continuance.

The United States Tenth Circuit Court of Appeals properly reviewed Professor Kanth's Motion for a Stay.

However, for all of the reasons set out in the denial of that Motion, the Motion was not well taken. (Petitioner's Appendix "D").

Professor Kanth last argues that the recording of the parties' settlement on the record somehow prejudiced his rights. First of all Professor Kanth had the opportunity to attend the first trial and failed to appear. His two attorneys, representing proper authority for a settlement, agreed on the record not only to resolve the Petition, but other matters as well. The District Court noted that it lacked any jurisdiction over the other matters agreed to. The purpose of the Stipulation was simply to preserve it on the record. In any event, the "settlement" was set aside at the request of the Petitioner. (Petitioner's Appendix "G").

SUMMARY OF ARGUMENT

The Hague Convention considers the removal of a child from his or her habitual residence wrongful. The Convention is designed to order the return of the child to the child's habitual residence more or less as a jurisdictional determination. In this case the children were not removed from their state of habitual residence but returned to their habitual residence in the United States of America, State of Utah.

The term "habitual residence" is an issue of fact and not subject to hyper-technical legalistic interpretations or tests. The case law has emphasized three factors determining habitual residence: (1) the parties' intent or purposeful design, including voluntariness of their decision;

(2) time; and, (3) geography. Where the period of residence is less than one year decisions on habitual residence depend primarily on the parties' intention. Where the residence was less than one year, Courts are much more inclined to find a temporary purpose for the residence and therefore no change in habitual residence.

The parties' two visits to Australia with their children were intended and designed to be temporary. All of their behaviors were consistent with this temporary design. Their furniture and personal effects were left behind in Utah.

They maintained a Utah address and all other legal attachments (driver's license, mailing address, etc.). The parties and their children moved seven times while in Australia. The children did not acclimatize. The Petitioner emotionally and physically controlled the Respondent so that she stayed on longer in Australia than was intended or promised. The Petitioner desperately sought employment in the United States during the entire time he was in Australia. Finally, the Petitioner moved to New York to take a position there and has since left New York to take a position in Singapore.

When Mrs. Kanth returned to Utah, Professor Kanth clearly acquiesced in the move. Even if her return was "wrongful" Professor Kanth's acquiescence is a complete defense to the Hague Convention Petition.

ARGUMENT

I. CORY KANTH'S RETURN TO UTAH WITH THE PARTIES' CHILDREN WAS NOT WRONGFUL BECAUSE THE UNITED STATES WAS THEIR HABITUAL RESIDENCE.

Article 3 of the Convention provides, in pertinent part, that:

> "The . . . retention of a child is to be considered wrongful where . . . paragraph (a) it is in breach of rights of custody attributed to a person . . . under the law of the state in which the child was habitually residing immediately before the removal or retention."

This case does not present an issue regarding Professor Kanth's rights of custody. Therefore, the principal issue before the Court regards the children's habitual residence when Cory Kanth returned to the State of Utah on March 25, 1999.

The terms "habitual residence" is not defined under the convention. Instead a child's habitual residence is to be determined by examining the specific facts and circumstances in each case. *Zucker v. Andrews,* 2 F.Supp. 2d 134 (D. Mass. 1998); *Meredith v. Meredith,* 759 F.Supp. 1432 (D. AZ., 1991); *LeVesque v. LeVesque,* 816 F.Supp. 622, 666 (D. Kan., 1993). Courts should not interpret the term technically or restrictively. *Rydder v. Rydder,* 49 F.3d 369, 373 (8th Cir. 1995).

> "The question whether a person is or is not habitually resident in a specified country is a question of fact to be decided by reference to all of the circumstances of any particular case." (*Lord Brandon of Oak Brooke, In Re Jay (a minor)*

abduction; custody rights) [1990] 2 A.C., @ P. 578; [1990] 3.W.L.R. @ P. 504; [1990] 2.ALL E.R. @ P. 965.

Determining the fact question of habitual residence involves the consideration of three principal elements: (1) intent, voluntariness, or purposeful design; (2) a lapse of a sufficient period of time; and, (3) geography or location (see, *The Concept of Habitual Residence*, Dr. E. M. Clive, the Juridical Review, 1997, Part 3, Page 137, included in Respondent's Appendix as Exhibit "C," Pages 24 to 35).

In *Application of Ponath*, 829 F.Supp. 363 (D. Utah 1993) habitual residence in Germany was not found where the parties' visit to Germany was based upon Mr. Ponath's promise to return within three months. Additionally, Mr. Ponath refused to let his wife and child leave and the Court found that she was detained in Germany against her desires by means of verbal, emotional, and physical abuse. In spite of a ten-month stay in Germany Mr. Ponath's Petition to return the child to Germany was denied. Judge Sam declared, "The Concept of Habitual Residence must . . . entail some element of voluntariness and purposeful design . . . [a] settled purpose." *Application of Ponath, Id.* @ 367.

> "Where the period of residence is less than a year there are decisions both ways. Much depends on purpose or intention in this type of case and Judges are much more likely to find that a temporary purpose for the residence prevents it from being habitual residence." (*The Concept of Habitual Residence*, Dr. E. M. Clive, *Id.* @ p. 27).

Although it takes time to establish habitual residence, it takes no time at all to terminate that status. All that is required is an intention on departure to stay permanently in another country. See *International Child Abduction*, Sandra Davis, Jeremy Rosenblatt and Tanya Galbraith, Seet & Maxwell, 1993, P. 55, citing, *C v. S* (Minor: Abduction: Illegitimate Child), @ P. 55 (the summary of this case, together with its full citation, is attached hereto in Respondent's Appendix Exhibit "D," Page 36). In *C v. S* an unmarried couple had a child born to them in 1987 while they resided in Australia. In 1990 the mother returned permanently to England without informing the father of her intention or preparations. Before the unmarried father could establish his rights of custody, the Court found that the mother had established habitual residence in England. The former habitual residence in Australia had been terminated immediately upon her departure.

In this case, the parties disagree as to their intention regarding both trips to Australia. Mrs. Kanth maintains that in both cases the trips were meant to be temporary with the specific intention to return at the earliest opportunity. Furthermore, Professor Kanth has documented that mutual intention extensively. The Kanth family took only clothing with them when they went to Australia on both occasions. They rented fully furnished apartments in Australia and moved seven different times. All of their important furniture and belongings remained in Utah anticipating their return. These belongings included personal mementos and items of particular significance to the children such as their toys, a child's rocking chair, family pictures and the like.

Even if the parties established habitual residence in Australia during their first visit, which is strenuously denied by Mrs. Kanth, that status was terminated upon their first return to the United States. At the time of their first return in the spring of 1998, the parties left their apartment and forfeited a substantial lease deposit. Their departure was abrupt. It was occasioned by Professor Kanth's reliance upon "psychic" readings and advice. Upon their return to the United States the oldest daughter was re-enrolled in school. The children were attended to by their historical family physician. All in all, their old family life resumed and went forward in Utah.

The parties' first visit to Australia was less than satisfactory. The family continually discussed their imminent return to Salt Lake City. The children had not acclimatized or socialized well in Australia. At all times relevant to these proceedings Professor Kanth maintained the family mailing address in Utah and listed it as his residence on his applications for employment and directed that responses be sent there. In fact, Professor Kanth set in place detailed plans and instructions with his father-in-law regarding correspondence and communication from prospective employers. Professor Kanth also listed the family's Utah address on numerous personal receipts and forms. He maintained his Utah driver's license and eligibility to vote. The Visa giving the family permission to live in Australia was for a temporary period.

When Professor Kanth could not find employment in the United States as soon as he had hoped, the parties saw no alternative but to return to Australia for a brief and temporary period of time in July 1998. Having

already visited Australia the parties were certain that they did not want to remain. Professor Kanth anticipated job opportunities including one particular position at Duke University. Mrs. Kanth was reassured and promised that the second visit to Australia would be for a period of weeks perhaps up to six weeks at the longest. With that in mind, the family visited Australia once again exhibiting the same behaviors they did before but with a new found resolve to limit their stay in Australia all the more. For the second visit the parties were certain that they did not wish to reside in Australia and Professor Kanth was certain that they would not have to, but for a very brief period of time.

Professor Kanth attempts to minimize the significance of his extraordinary job search efforts. He has stated that his hundreds of applications for employment in the United States, while he was employed at UTS, and at the expense of UTS, constitute a common practice in the industry. Dr. E.K. Hunt, Professor of Economics and Chair of the Department of Economics at the University of Utah observed that such a practice is unusual:

> "I do not know a single academic who has used either applications or job offers in this way. I have heard stories of this being done. I can state, however, that it is very rare, and that in no case, in these stories, has a person sent out hundreds of applications. Where it is done, the individual is virtually always a famous, very highly regarded academic and two prestigious universities are 'bidding' for him or her. I can assure you that Rajani Kanth does not fall into this

> category. I seriously doubt if any faculty member in either UTS or Wagner College fits this category.
>
> I believe that any fair minded academic seeing an instructor at UTS sending out hundreds of applications would conclude that the instructor is desperate to leave. When Dr. Kanth communicated with me I definitely felt that he wanted desperately to leave." (Affidavit of E. K. Hunt, dated November 30, 1999, p 2, Docket No. 22).

It is during this same time, during the second visit, that Dr. Kanth's efforts to control the Respondent intensified, just as in the *Ponath* case. Not only did Dr. Kanth engage in emotional abuse and control, Cory Kanth was financially restrained from leaving and Dr. Kanth maintained physical possession of the passports until shortly before the Respondent's departure with the children.

Lastly, from the children's point of view, it cannot be said that Australia was ever their habitual residence. The parties' oldest child, Malini, attended school but only sporadically. She was referred to as "the American visitor". Her accent was ridiculed. She ate lunch alone and only made her first friend a couple of months before returning to the United States. That friend only visited the Kanth household once to play with Malini.

It cannot be found that a sufficient period of time elapsed in either the first visit or the second so as to conclude on that basis alone that Australia become the children's habitual residence. Therefore, the Court must discern the parties' intention from the objective evidence as much as possible. This was Judge Campbell's stated

objective. Judge Campbell structured a "fast track" procedure and stated in the process that she would give particular weight to the documents and objective evidence when comparing those facts to the parties' own testimony. In the process the Court properly concluded that the parties never had the proper intent to make Australia their residence and therefore lacked the "settled purpose" often referred to in Hague Convention case law. Judge Campbell was particularly impressed that the Kanth children never acclimatized to the Australian environment given the fact that there was no "settled purpose". Judge Campbell did not address the issue of "voluntariness", controlling behavior on the part of Professor Kanth, or the emotional physical abuse. Similarly, the Court did not address the issue of Professor Kanth's acquiescence. However, these two factors would also be grounds to sustain the Court's result.

II. PROFESSOR KANTH ACQUIESCED TO CORY KANTH'S RETURN TO SALT LAKE CITY WITH THE CHILDREN.

Even if Australia was the habitual residence of the Kanth family on March 25, 1999, that status would have been terminated based upon Mrs. Kanth's return to Salt Lake City and Dr. Kanth's acquiescence thereto. Acquiescence is defense to an otherwise well taken Hague Convention Petition. See *In Re A and another (minors) (abduction: acquiescence)* [1992], 1 ALL ER 929, CA; [1992] FAM. 106, Respondent's Appendix Exhibit "E", Pages 37 to 54. In *In Re A and another (minors)* the Court ignored a mother's secret moving of her children from Australia to England by finding that the father in his letters to the

mother stated that he knew of the mother's actions, understood they were illegal but was not going to fight the matter.

Here the Petitioner wrote a letter to Marvin Meyer, the Respondent's father, which bears the "fax" date of April 5, 1999 which is document 032-033 attached to Respondent's Affidavit I, Docket No. 26. That letter states as follows:

> "I am trying my best, as I have had for years, to find employment back in the US: in the very short run, this may or may not happen. But the long-run prospects remain very high given the level of my productivity. It may happen as early as this fall or may be a bit later . . .
>
> I have promised to organize life differently for her; we can buy a house here and live normally instead of living as if we were leaving the next day as we have since we arrived in Australia.
>
> Of course this is up to Cory: but you are my father-in-law, and about the only family I have left, and I want to be assured that the basis exists now – as it has for some time now – for normalcy in our lives battered as we have been thus far by frequent moves.
>
> If Australia does not please her, and this is important for you to know, I am ready now to return to Utah and look for employment there, no matter what it takes.
>
> . . . I have a permanent job here, Cory will have one to. But only if she chooses to: if not, I will try to find a similar set up in the US ASAP so the kids and Cory can be close to family again. It is for this reason that I have spent the last five years applying to jobs in the US."

Once again, the Petitioner made good on his expectation. Before this case had even reached its first hearing, Dr. Kanth had accepted a position in New York at Wagner College although he failed to disclose that fact in time for the first hearing, August 24, 1999. The Wagner College posting was for a period of one year. Dr. Kanth testified that he still had his UTS position waiting for him. While this matter has been on appeal Dr. Kanth has taken yet another position in Singapore, thus continuing the "peripatetic existence" that the parties had experienced for years ("Order" Judge Tena Campbell, December 14, 1999 at Page 4 quoting the letter from Owen to Kanth to May 11, 1999, document page number 020, exhibits to Respondent's Affidavit I, Docket No. 26).

III. THE OTHER REASONS CITED BY THE PETITIONER IN SUPPORT OF HIS PETITION FOR WRIT OF CERTIORARI ARE INADEQUATE FOR THAT PURPOSE.

Professor Kanth suggests that his Petition be granted because: (1) he was denied due process for lack of counsel and in the absence of his personal appearance at the trial; (2) the Tenth Circuit improperly denied his Petition for a stay of proceedings; and (3) the Court should not have entertained the settlement of his case at the first trial setting.

Professor Kanth had more than ample time to secure an attorney. He had hired and discharged two attorneys before.

The Tenth Circuit Court of Appeals properly denied Professor Kanth's Motion to stay the State Court proceedings. Professor Kanth's Motion was inadequate. He has simply restated that same Motion in his Petition before this Court.

The trial Court's entertainment of a settlement in no way prejudiced Professor Kanth's Petition. When Professor Kanth sought to set aside the settlement his Motion was granted. Professor Kanth has no one to blame but himself for the settlement in the first place. He failed to appear for the first trial setting and his attorneys acted on his behalf with full apparent authority to do so.

CONCLUSION

Mrs. Kanth's return with the parties' children to Utah was not wrongful. The United States, State of Utah was and remains the childrens' habitual residence for purposes of the Hague Convention. All of the parties' actions were consistent with their intention to live in Utah. Their visits to Australia were purely temporary. The children never became attached to the Australian residence or environment.

Even if the removal of the children was wrongful, Professor Kanth acquiesced to their return. During the pendency of this case Professor Kanth has relocated to the United States which effectively moots any claim under the Hague Convention.

The Order of Judge Tena Campbell dismissing the Petition should be upheld.

DATED THIS 25th day of May, 2001.

Respectfully submitted,

GREEN & BERRY
FREDERICK N. GREEN
Attorney for Respondent

APPENDIX

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IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH CENTRAL DIVISION

RAJANI K. KANTH Petitioner, vs. CORY LEIGH KANTH Respondent.	AFFIDAVIT OF CORY LEIGH KANTH, DATED NOVEMBER 30, 1999 Case No. 2:99 CV 532 C Magistrate Samuel Alba

STATE OF UTAH)
: ss
COUNTY OF SALT LAKE)

CORY LEIGH KANTH, being first duly sworn upon her oath, deposes and states as follows:

1. I have received and reviewed the Petitioner's supplemental "Affidavits in Support of Reply to Respondent's Memorandum and also Petitioner's Reply to Respondent's Memorandum" dated November 6, 1999 together with a supplemental affidavit mailed to the Court, and not served upon my counsel until the Court sent a copy to him on November 15, 1999.

2. By and large the affidavits in support amount to character references and the other letters, court filings, and the like which duplicate earlier filings in this case.

3. The Petitioner's *Pro Se* "Reply" contains a number of allegations which are not supported by evidence or affidavit. Rather, these allegations contain the testimony of Mr. Kanth.

4. In particular, the Petitioner's "Reply" contains allegations regarding the parties "settled intent" to reside in Australia as well as my intent.

5. This affidavit is meant to address the factual allegations of the Petitioner's "Reply" particularly those that relate to the intention of the parties, the circumstances surrounding our first departure from Australia, the circumstances surrounding our return to Australia and the failure of the children to acclimatize to the Australian environment.

I. THE PARTIES FIRST DEPARTURE FROM AUSTRALIA

6. The Petitioner alleges that the parties first departure from Australia, in March 1998, was due to an assault on your Affiant and a resulting emotional response. There is nothing except for the Petitioner's own testimony to support this allegation.

7. No such assault took place. The Petitioner refers to an incident when I broke down and cried, in December 1997, when contemplating the state of my marriage and the likelihood of divorce. A shop keeper who witnessed my crying offered some consolation and in a gesture of

compassion and nothing else kissed me on the forehead. I later related this instance to the Petitioner and he has now attempted to blow it out of proportion. Suffice it to say I was not distressed, I was not distraught, I sought no professional help due to this incident, and I never referred to that incident again for any purpose.

8. In fact, the Petitioner wished to return to the United States and Salt Lake City for his own personal reasons.

9. The Petitioner has regularly relied upon a psychic and those who would analyze the "horoscope".

10. As an example, the Petitioner sent to me a horoscope analysis that he obtained this summer, attached and marked Exhibit "A". The Petitioner sought and received a similar horoscope in January 1998 which revealed to him some distressing news. The horoscope or the psychic told him that he had a physical problem which the Petitioner interrupted as potential cancer. For that reason he sought out the help of therapists in order to make his case for a "health leave of absences" from his current position at the University of New South Wales. He was successful in doing this and resigned his position at New South Wales and we returned to Salt Lake intending that it be permanent return.

11. In addition to the Petitioner's distress over his horoscope diagnosis, he was also dissatisfied with his future prosects [sic] for employment in Australia, and neither of us found Australia to meet our needs and more importantly the needs of our children and so we intended to make our return permanent when we left Australia the first time.

12. As a result, we treated our return to Salt Lake City in 1998 as a permanent relocation and took all of the steps consistent with that intention including the registration of the children in school, securing medical care for the children, seeking employment here, and unpacking and using our personal property which we had left behind during our first trip to Australia.

13. The only support for the allegation that I was unstable after the alleged assault are the affidavits of Dr. Jan Hogan and Ms. Jenean Costa. I have never visited with either of these witnesses except very briefly and socially. I never consulted with Dr. Hogan as there was no need. Rather, Dr. Hogan diagnosed Mr. Kanth as suffering from depression.

14. The Petitioner has spread rumours about my mental state since at least 1997. It was only recently that I have discovered the extent to which he has spread these rumours. Likewise, it is only recently that I have discovered that his personal disparagement of me was meant to be a control technique of his should I ever decide to separate from him as I have repeatedly suggested since about that same time, 1997.

15. In fact, in 1992 I was hired by the Central Intelligence Agency and given their highest level of clearance following a thorough background check including interviews of all former employers, colleagues, and neighbors and a two day psychological evaluation including a polygraph examination.

II. THE CIRCUMSTANCES SURROUNDING THE PARTIES RETURN TO AUSTRALIA

16. For all of the reasons outlined in my earlier affidavits, our return to Australia in July 1998 was meant to be temporary.

17. Mr. Kanth was never satisfied with the position he had at the University of Technology, Sydney (UTS). The position was that of lecturer. It constituted a "step down" from his earlier position at University of New South Wales. Also we all desired to reside in the United States.

18. Mr. Kanth had some employment prospects which were immediate, including a position at Duke University. Our expectation was that we would fulfill a portion of the first six month contract with UTS and then return to the United States to take a position at Duke University. To that end, the Petitioner set up a method by which stateside Universities would correspond to a Salt Lake City address thereby not revealing his current position at UTS.

19. I am still discovering different Universities that he applied to during the entire period of time he worked at UTS. In each case, the return address that he employed was that of 2736 East 7305 South, Salt Lake City, Utah. Exhibits "B", "C", and "D" are some of the letters in response to Mr. Kanth's applications in addition to those I put forth earlier.

20. Exhibit "E" is a list of Universities where I helped the Petitioner apply for employment while he was an instructor at UTS.

21. The reasons for our wishing to return are set out in my earlier affidavit and may be summarized as follows:

a. The inability of our children to acclimatize to the Australian circumstances.

b. The health concerns we had for our children in Australia.

c. The Petitioner's dissatisfaction with his employment circumstances in Australia.

d. Family members resided in the United States.

e. The fact that it was difficult to obtain United States employment while residing abroad.

22. Mr. Kanth suggests that his job search activities were ordinary for an academic and not indicative of our desire to leave Australia. There was nothing ordinary about the Petitioner's job search. It was time consuming and he often complained to me that he had very little time for his real work because so much of his time was taken up in attempting to get back to the United States.

23. The Petitioner's job inquiries were directed at every level of employment, even as instructor at a community college or a temporary assignment of a fellowship or the like.

24. I am informed by people in the industry that job searches of this are very unusual and suggest disloyalty to the academic's current employer. This is in addition to the fact that the cost of the job search was actually being

passed along to UTS by the Petitioner. This cost was estimated to be $10.00-$15.00 per application.

25. The Petitioner corresponded with Professor Robert Heilbroner. Mr. Kanth confided in Professor Heilbroner about the depth of his discontent with Australia and his desire to leave there at any possible opportunity. However, Mr. Kanth always portrayed his reasons for wanting to return to the United States as having more to do with my discontent or other family problems. I am aware of the correspondence between Mr. Kanth and Professor Heilbroner because the correspondence was routed through my parent's address in Salt Lake and my mother was given the duty of opening and reading the mail (see document 056 in my original document submission).

III. THE CHILDREN'S FAILURE TO ACCLIMATIZE TO THE AUSTRALIAN ENVIRONMENT

26. Malini, the oldest child, is an excellent student and performed well academically in Australia. However, Malini continued to complain about feeling uncomfortable among her Australian peers and very self conscious because of her "American accent" (her words) and so on. I give greater detail of these circumstances in my August 18, 1999 affidavit.

27. Exhibit "F" is Malini's second grade, Cottonwood Heights Elementary School report card. This report card should be compared with her Kindergarten report card, from Australia document pages 1443-1440. The report cards from the Australian Kindergarten showed

that Malini was having difficulties following whole class instructions, was demonstrating timidity, and further behavioral difficulties. Her US report card gives her honor grades in all areas including "listening and following instructions" and "getting along with peers".

28. While in Australia we attempted to on many occasions to integrate the children into the Australian culture. However, this proved difficult because of:

a. The obvious cultural differences.

b. The Petitioner's reluctance to allow the children to freely and fully associate with other children in the area (sometimes due to health concerns).

c. Our frequent moves while residing in Australia (7 times during the totality of our stays).

d. Our continual discussion, involving the children, indicating our anticipated return to the United States as soon as possible.

IV. MISCELLANEOUS ALLEGATIONS

29. The Petitioner alleges that my allegations regarding his use of the children's passports as a control device are false. Document pages 296-310 consist of the Petitioner's poem/letter which is particularly revealing in several respects. On page number 305 he states "I ask you for the passports and you/felt I wish to steal our jewels/from you/I know/I knew/ that is what you thought . . . ".

30. That same poem/letter reveals his apology for his disparaging comments and verbal abuse at page 298:

"mens words like whips and so have I . . . " and " . . . mens anger get staringly projected my guilt made me angry with me . . . so I threw words . . . strong words . . . ".

31. That same poem/letter also indicates, age [sic] page 306 his desire to return to the Untied [sic] States and "find a job back in the US . . . " when I held/my head and sat/in pain/it was thinking of ways/multiple ways to get us out/fast . . . ".

32. The letter of Dr. Jane Dean of Wagner College suggests that the Petitioner took a "substantial cut in pay to come to Wagner College". In fact, the income is similar if not slightly in excess of the UTS salary.

33. The Petitioner has represented to the Court, at the status conference as follows: "I simply could not afford to pay American lawyers on an Australian salary, which is why I took leave from the University and sought a temporary position, which is what I have currently . . . " (Transcript of status conference, October 18, 1999).

34. Furthermore, the Petitioner's suggestion that there is some income tax advantage to working in Australia is false. Attached and marked Exhibit "G" is the "Amended Assessment" for the Australian tax office showing a tax rate of approximately 29% which is roughly comparable to that which we would experience in the United States.

35. The Petitioner has shown a history of seeking and obtaining employment leave typically for health and family reasons. Not only was this the justification for the early departure from the University of New South Wales

in the spring of 1998, it is the reason that he has suggested now for his open ended leave of absence from UTS.

36. This is fortuitous for the Petitioner because it not only allows him to have a "fall back" position at UTS (which serves his position in these proceedings) but it also allows him to work stateside where he may more actively seek long term employment in a position that meets his criteria and expectations in ways that the UTS position cannot.

37. The Petitioner has told me many times that even one semester in the United States would give him the opportunity to seek something more permanent here with one institution or another.

38. The Petitioner suggests that I was actively seeking employment in Australia during our second stay there. This is false. In approximately December 1998 or January 1999 the Petitioner made an appointment for me to see Professor John Lodewijks. The Petitioner had told me that our financial circumstances were dire and that we needed the extra income. I met with Professor Lodewijks who indicated that I could lecture there as an adjunct at a basic hourly rate of pay. Rajani had coached me in suggesting that one of the reasons I sought the employment was to solve our financial difficulties, and Dr. Lodewijks was sympathetic. I never fulfilled any terms of that offer because Rajani shortly thereafter assumed that he had cancer and scheduled our abrupt return to Utah. I signed no contract, and none was offered. I sought no other position and in fact did not seek that one except through the arrangement and encouragement of Rajani. After my

departure from Australia, Rajani then contacted Professor Lodewijks again to see about more permanent positions at UNSW in an attempt to entice me back to Australia.

39. Lastly, Exhibit "H" are the luggage tags attached to the luggage that the Petitioner brought with him in April 1999 containing the children's possessions. This is consistent with the Petitioner's explicit and tacit agreement with my return to the United States, at that time, as expressed in his letters including the letters to my father.

40. Consistent with that agreement and acquiescence, the Petitioner sought and secured a position under a one year teaching contract at Wagner College at about or prior to the time he filed his Hague proceeding petition. Nevertheless, the Petitioner failed to disclose not only his intention to return to the United States but the long term nature of that return until after the first hearing that was scheduled for August 24, 1999. Only when it became obvious that the Petitioner could not conceal his whereabouts did he disclose his contract with Wagner College and his relocation to New York. This position fulfills the Petitioner's expectation that he would "get out fast", return to the United States, and use it as a base of operations to upgrade his employment as well as serve the other family purposes identified above.

DATED THIS 30th day of November, 1999.

/s/ Cory Kanth
CORY LEIGH KANTH
Affiant

SUBSCRIBED AND SWORN to before me this 30 day of November, 1999.

/s/ Talisha Anne Blonquist
Notary Public
Residing in Summit County
County, State of Utah

My Commission Expires:
[LOGO]

CERTIFICATE OF SERVICE

I hereby certify that a full, true and correct copy of the above and foregoing *AFFIDAVIT OF CORY LEIGH KANTH* was faxed and placed in the United States mail at Salt Lake City, Utah, with first-class postage thereon fully prepaid, on the 30 day of November, 1999 addressed as follows:

Professor Rajani Kanth
Social Sciences
One Campus Drive
Wagner College
Staten Island, New York, 10301

Fax Number: 718 390 3467

/s/ Talisha Anne Blonquist

[Exhibits Omitted In Printing]

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IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH CENTRAL DIVISION

RAJANI K. KANTH Petitioner, vs. CORY LEIGH KANTH Respondent.	**AFFIDAVIT OF CORY LEIGH KANTH, DATED AUGUST 18, 1999** **Case No. 2:99 CV 532 C** **Judge Tena Campbell**

STATE OF UTAH)
: ss
COUNTY OF SALT LAKE)

CORY LEIGH KANTH, being first duly sworn upon her oath, deposes and states as follows:

I. BACKGROUND FACTS

1. I am the Respondent in the above entitled action and I am fully competent based upon my own personal knowledge of the facts alleged herein to make and execute this affidavit.

2. The Petitioner and I were married March 16, 1990 in Salt Lake County, Utah. (See document page number 196).

3. Our two children, Malini Amstel and Anjana Kesari were both born in Salt Lake City, St. Marks Hospital, on April 1, 1993 and February 20, 1996, respectively.

4. The Petitioner was born in India and became a naturalized citizen of the United States in 1985. I am a U.S. citizen by birth and have resided in the state of Utah since then, except as explained hereafter. (See document page number 256). All family members travel on U.S. passports only. (See document number 254).

5. The following schedule describes the family travels over the past approximately three years. We have travelled to Denmark and Australia so that the Petitioner could complete temporary work assignments:

DATE	EXPLANATION
1993 through June 1996	Children resided with both parents in Salt Lake City, Utah
June 28, 1996	Mr. Kanth, alone, leaves to take a temporary position in Denmark
June 1996 through September 23, 1996	Children reside with Respondent in Salt Lake City
September 24, 1996 through April 16, 1997	The children and the parties reside in Denmark

April 16, 1997 through June 3, 1997	The children reside with the Respondent and their maternal grandparents in Salt Lake City, Utah
June 4, 1997 through July 15, 1997	Petitioner joins the children and the Respondent in Salt Lake City
July 17, 1997 through April 6, 1998	The parties and the children reside temporarily in Australia where the Petitioner takes a temporary work assignment
April 6, 1998 through July 6, 1998	The children live with the parties in Salt Lake City together with their maternal grandparents
July 8, 1998 through March 25, 1999	The children and the parties reside in Australia while the Petitioner fulfills a temporary work assignment
March 25, 1999 to the present	The children and the Respondent reside in Salt Lake City, Utah

6. Because the Petitioner and I wished to maximize the time that the children lived in Salt Lake, the Petitioner left for Denmark before I did with the children, and he also stayed on after our return.

7. Rajani moved to Salt Lake City in 1987 with his first wife to take up a "tenure-track" (7 year) position with the University of Utah, where he worked until 1994. I also taught at the University Utah as a doctoral student. After our marriage, in 1990, we lived "rent free" as care-

takers of a home owned by a friend who moved overseas. Rajani had lived in this same home after his divorce in 1988. Rajani and I lived in this same home for four years after our marriage until May 1994, when the owner sold the home. (See document page number 228).

8. At that time Rajani and I made an offer on a home in Sandy which was accepted. Rajani had a great deal of debt and one prior bankruptcy and had just lost his job. Therefore, my father cosigned on the loan and provided the down payment for the home. The agreement was that my father would be a title owner to the property along with Rajani. While the Petitioner's negotiations with his ex-wife to reduce support were ongoing, title was transferred to my father's name alone at the request of the Petitioner. (See document page numbers 84-88; 228-231; and 235-236).

9. We moved into the Sandy home in June 1994. (See document page number 87).

10. During parts of 1994, 1995 and 1996 Rajani was unemployed. We lost our car and my father helped us purchase a new one which we still own and has remained in Salt Lake City throughout all of our travels abroad. (See document page numbers 89-94 and 240).

11. During these times, Rajani's ex-spouse was garnishing his unemployment compensation. Under these circumstances we considered going abroad for purposes of temporary employment with the understanding and agreement that we would return to Utah where we had both lived and where my family resides. (See document page numbers 233-251).

II. THERE WAS LACK OF "SETTLED PURPOSE" OR INTENT TO MAKE AUSTRALIA THE STATE OF HABITUAL RESIDENCE

12. In 1992 it became apparent that the Petitioner's contract with the University of Utah to teach in the department of economics would not be renewed. We looked first in the United States for employment and then, out of necessity, applied for a position in Denmark which a colleague of Petitioner had mentioned was looking for a visiting fellow. During all periods of time all of our possessions have been stored in Salt Lake City and we have taken only suit cases full of clothing and a small amount of toys, videos and books for the children when we travelled abroad. In 1993, Mr. Kanth was denied tenure at the University of Utah. He desperately searched for employment in the United States as a professor, sending out between 90 to 150 resumes to various colleges and universities. However, Mr. Kanth was unsuccessful. Therefore, shortly following the birth of Anjana, Mr. Kanth accepted a temporary academic position with the University of Aarhus in Denmark. Upon their return to Utah, Mrs. Kanth enrolled Malini in preschool. She made many friends and excelled in school. He immediately began looking for employment as a professor at colleges and universities in Utah and, alternatively, throughout the United States. He sent out hundreds of resumes to American schools over several months. However, he was once again unsuccessful in finding a job in the United States. (See document page numbers 235-238 and photographs).

13. All of our furniture and possessions have been stored in my parents' garage, or in the garages of my

grandparents or my brother's home. The Kanth family obtained a temporary visa and arrived together in Australia on July 17, 1997. They left all of their furnishings and personal belongings, other than a limited amount of clothing, in storage in Salt Lake City, expecting to return within six months. (See appended photos).

14. When we left for Australia, on both occasions, all of the furniture and other items including large and small furniture, our washer and dryer, and the other items appearing on list (see below), were stored here. These items were left in storage and have been left in storage because it was our intention to return to Utah no later than six months after our departure. (See document page numbers 95-96 and 001-002).

15. We have always maintained our mailing address in Salt Lake City. For any business which we have conducted, the Salt Lake City mailing address has been used as our return address. All credit card accounts, life insurance, and retirement fund accounts, bank statements, frequent flyer accounts and the like have continued to use the Salt Lake City address. Mr. Kanth maintained his Utah driver's license and eligibility to vote while abroad. (See document page numbers 52-80).

16. The Petitioner is required to keep his former spouse informed as to his employment circumstances so that his child support obligations might be adjusted (the existing child support order reflects Rajani's unemployed status). The Petitioner has used my parents mailing address as his residence address in his dealings with his former spouse. The Petitioner is delinquent in the payment of support under the Decree and has not paid

support for more than two years. (See document page numbers 100-106 and 108-116).

17. The Petitioner has never informed his former spouse of any other address except the Salt Lake City address when dealing with his former spouse or discharging his obligation under that divorce decree. (See document page numbers 118-120).

18. The Petitioner has also provided his former spouse with the address and telephone number of my parents for purposes of contact in the event of an emergency. (See document page numbers 107 and 119).

19. Before our first trip to Australia, I wished to remain in the U.S. I had asked Rajani for a divorce; and he insisted he would not take the position in Australia if I did not accompany him, and I finally agreed to go, primarily because his contract expired in 6 months. We quickly decided that we disliked Sydney and our decision to leave Australia at the earliest possible time became certain when we discovered the physical and medical risks to our children. We were informed while there of an out break of Meningia Cocyl. (See document page numbers 132-133). Malini became fearful of becoming ill that she refused to attend activities of any sort. (See document page numbers 125-130). He did receive a six-month appointment at the University of New South Wales in Australia. Neither Mrs. Kanth or the children wanted to move. They voiced their opposition to Mr. Kanth on several occasions. However, because of the family's precarious financial situation, Mr. Kanth accepted the position. He told Mrs. Kanth it would only be for six months and could lead to a position in the

United States. On this basis, Mrs. Kanth agreed to accompany him with the children.

20. There were other aspects of life in Sydney that we did not like and which created an unsafe and unacceptable environment for us to raise our children. In 1998 there was a significant health threat due to contaminated water in the Sydney area as well (a lesser scare had occurred shortly after our arrival in 1997). Malini was particularly frightened, and demanded that we return home. (See document page numbers 135-136).

21. Our first visit to Australia was always deemed to be a "spring board" to a position in the United States. While the family was in Australia, Mr. Kanth continued to search for employment in the United States. He failed to obtain any offers. The family had no money to return to the United States. Therefore, when the University of New South Wales offered him a six-month extension, he accepted. Because the family's six-month lease on their first apartment expired, they found alternative housing. They signed another six-month lease but broke it early to return to Salt Lake after three months. During their entire stay in Australia, Mr. Kanth kept control of each family members' passport. (See document page numbers 001-012).

22. In the spring of 1998 Rajani secured an interview at Franklin and Marshall College in Pennsylvania. We anticipated other interviews as well. It was financially impossible for us to fly back and forth between the countries for each interview. Given that our ultimate goal was to return to the United States we decided to return before other interviews were scheduled. Rajani and I had both

applied to numerous colleges and universities in the United States by this time. Mr. Kanth did not complete his second six-month term with the University of New South Wales. He, instead, returned with Mrs. Kanth and the children to the United States on April 6, 1998 in search of employment there. (See document page numbers 010-012; and 019).

23. Contrary to the Petitioner's allegations, our return to Utah in 1998 was not a vacation or holiday. Rajani's separation from the University of New South Wales was permanent and was granted based upon Rajani's request and his description of his difficulties in his personal life. We transferred back to Utah never expecting to return to Australia. We returned despite a job offer from UTS and despite losing a $1,120 rental bond. Petitioner searched for apartments in Salt Lake, and called Westminister College, the University of Utah, Salt Lake Community College, Salt Lake County Health Department, Rowland Hall, and the Waterford School regarding employment. I applied to Fidelity Investments, as well as other employers. He completed a full day of interviews and a teaching demonstration at the Waterford School. He also sent out application packages nationally. Mrs. Kanth enrolled Malini at the same preschool she attended the summer before. She and Anjana reunited with several friends and enjoyed playing with them. Mr. Kanth looked at several apartments in Salt Lake, where he also made many job inquiries. In the event he was not able to find a job in Utah, Mr. Kanth also submitted applications and resumes to several colleges and universities outside of Utah but within the United States. He interviewed for a position in Pennsylvania and traveled

to Harvard to explore his connections there. Mr. Kanth was again unable to find employment as a professor in the United States. He, therefore, accepted a position previously offered to him at the University of Technology, Sydney. (See document page numbers 189-195 and 020).

24. Once in Utah we determined that we might be forced to return to Australia. However, based upon our earlier experience we had the explicit understanding that this visit would be for a very limited time. This was based upon our earlier unsatisfactory experience with Sydney and the area, and the health risks of the children. The plan was to return in four to six weeks and at the most two months. Rajani anticipated a position at Duke University within that period of time to commence in the fall semester 1998. Rajani was sure that we would be back in the United States by fall 1998. (See document page number 056).

25. I made it clear and Rajani agreed that in the event that he was forced to stay on in Sydney beyond that maximum two month period of time that I would return with the children in advance of his return. This was consistent with our earlier experience in Denmark where I did not accompany Rajani when he initially left for Denmark and returned with the children in April, while he joined us at the expiration of his contract in June.

26. When we left for Australia the second time, our personal property remained in storage. Rajani made the decision not to ship the personal property to Australia. (See document page numbers 95-99).

27. Our departure from Sydney and the University of New South Wales the first time was based upon

Rajani's application for "health leave" after a psychic healer determined that he had a growth in his lower abdomen. Rajani immediately asked me to call my parents in Salt Lake to schedule our return and his medical treatment. Despite reassurances by Australian doctors, Rajani insisted on going back to the United States. Until I saw the May 22, 1998 letter from Dr. Jan Hogan, I did not realize that Rajani had used other reasons as the basis for the health leave. (See Petitioner's Exhibit "H").

28. Rajani's self serving report to Doctor Hogan concerning an "attack" on me is a fabrication of Rajani's that he reported in order to secure health leave to return to the United States. He did not want to tell any professional that he was acting on the advice of a psychic healer. Upon our return to Utah in April 1998 Rajani immediately travelled to Harvard University in conjunction with a research fellowship that he had obtained there, which he hoped would improve his employment possibilities in the U.S. This fellowship also coincided with an interview in Pennsylvania. By July 6, 1998 it became apparent, however, that we would have to return to Australia, albeit for a short period of time. We were very uncertain about the return and therefore delayed our actual flight to Australia to a later date based upon Rajani's report to the airline that we had been involved in a traffic accident, which was untrue.

29. I received an offer of employment in Salt Lake at this time. Rajani would not to allow me to accept it, as he felt he could not sacrifice the time he spent writing and doing research to take care of Anjana. The family was scheduled to leave for Australia on July 5, 1998. However, none of them wanted to go. They loaded the few suitcases

they packed into a van but decided not to leave. The next day, Mr. Kanth determined the family would have to go. He told them to put their bags in the car. They left so quickly between the time he made the decision and the time they left that they barely had time to reload their bags. The family left reluctantly for Australia on July 6, 1998. Their property again remained in storage. When they arrived, they negotiated a six-month lease for a fully furnished apartment that included a car. That was the shortest lease period the Kanth's were able to obtain.

30. Rajani had reassured me that our second stay in Sydney would be only one month, or six weeks, and a maximum of two months. However, Duke University failed to contact him as expected and we both became very worried. We had a string of accidents including a fire in our hotel and a car accident for each of us (See document numbers 81-83). We both doubted the prudence of our decision to return for a brief period of time to Australia. In a conversation at this time Rajani recited a list of colleges that were still considering his applications. He was particularly confident about one. He explained to me that he intended to return to the U.S. around Christmas 1998 for his annual job seeking conference (the American Economic Association annual meetings). Since one ticket would be paid for by his department, he said it would make sense for all of us to go then. He ended the conversation by saying that if he had not received an offer by that time we would all return anyway and simply begin looking for something else here. Rajani was worried that the more time he spent in his position at UTS as a lecturer in a business school (as opposed to a professor of economics at a nationally

ranked university in the U.S.) the more his reputation and prospects would be damaged. He reassured me that he would leave then even if there was not a position to come to. (See document page numbers 252-253).

31. In July 1998 we had negotiated a six month lease on a house. This was the shortest rental agreement we could find. Rajani negotiated with the owners for an early termination of the lease based upon our intention to return to the United States over the Christmas holiday. When Rajani left around January 1, 1999 he asked how long it would take me to pack if the family were to join him suddenly. He instructed me to begin packing and plan to come as soon as he sent word. However, no position materialised [sic], and Rajani returned. (See document page number 179).

32. Since August, 1998 Rajani had again and again made it clear that he would be happy for me to return to the United States but without the children. None of the jobs in the United States materialized. Mr. Kanth, however, continued to refuse to allow Mrs. Kanth and the children to return, as promised. Malini repeatedly stated she wanted to go home and asked on several occasions when they would return to Utah.

33. In January, 1999 a job offer from Singapore came and Rajani began to consider this and I became much more alarmed. (See document page numbers 027-029).

34. In March, 1999 Rajani angrily told me that he would never allow the children to be in my parents home unless he was with them there. This response was to my suggestion that the children and I could live in Salt Lake City while he "tried out" Singapore. He then stated that

they would be better off in India around "proper" people and proper little children. By this time I felt that I was being held as a prisoner, I was very worried and I knew that in anywhere but the United States Rajani would control my life and where I lived because of the financial, legal and emotional control that he had exercised. Mrs. Kanth and the children remained with Mr. Kanth in Australia against their will. On March 19, 1999, Mr. Kanth angrily told the children, "Today is the day I am going to cook your momma's goose." He spent the next six days searching the house for their passports and exchanging phone calls with relatives in India. As Mrs. Kanth was leaving to take Malini to school the morning of March 25, 1999, Mr. Kanth demanded that Mrs. Kanth give him the childrens' passports as well as her own. Frightened, she told him she would get them for him when she returned. When she came home, Mr. Kanth had left for work. Fearing for her safety and her future with the children, Mrs. Kanth returned with the children to the United States on March 25, 1999. She left a note for Mr. Kanth telling him they would be at her parents' house in Utah. (See document page numbers 027-029; and 166).

35. After I returned with the children to Salt Lake on March 25, 1999 Rajani arrived on April 2, 1999. He came to the home carrying two large suit cases and a duffel bag filled with most everything of the children's which had been left behind in Australia. He did not appear to be upset that we were in Utah. He also planned to stay in Utah at that time. After he returned to Sydney he wrote to my father saying "if Australia does not please [Cory] . . . I am ready to now return to Utah and look for employment there . . . " Mr. Kanth traveled to Utah on

April 2, 1999. He did not appear to be upset that Mrs. Kanth and the children had left. He seemed relieved to be back in the United States. He never demanded that the children return to Australia. (See document page numbers 032-033).

36. After returning to Salt Lake Rajani never asked me once to return the children to Australia until the proceedings were commenced. However, he did attempt to persuade me either to return with him, or join him somewhere in the U.S. (See document page numbers 032-033, and 261-262).

37. While in Utah in April 1999 Rajani attempted to find work here. This proved unsuccessful and he decided to return again to Australia. He said that he was on "family leave" and if he chose not to return "they would understand completely." When he decided to return he said nothing about my returning the children. In fact he stated that he was grateful to me for giving him "a wake-up call". (See document number 262). In a faxed letter to me dated May 11, 1999 he says "An act of will as heroic as you leaving Sydney: that's all it takes . . . " He returned to Australia April 22, 1999 after 20 days in Salt Lake. He called many times thereafter to discuss issues of visitation. He informed me that he obtained a job at a college or university in the "North East" and that he had persuaded them to allow me to teach in conjunction with their offer to him. Because I refused to join him in the "North East" Rajani explained to me that he would not take that position because he had been informed that if he stayed in Australia the children would be sent back to him as a matter of international law. I told him that such an offer might not come again. Later he called me and

told me he had decided to "take the plunge" and remain in Australia for purposes of trying to have the children returned to him. It is my impression based upon all of our conversations that Rajani is much more interested in reconciliation with me than custody of the children, but that he will use custody of the children as a tool or weapon to accomplish reconciliation. (See document page numbers 032-033 and 261-262).

38. Before Rajani left for Australia April 22, 1999 he told me that he "cared nothing for the children" and I was "all that mattered". He stated, however, that if I chose not to return he would "come after" the children. When Mr. Kanth told Mrs. Kanth he was returning to Australia, he admitted it was the only way he might regain custody of Malini and Anjana. He also told Mrs. Kanth that he "cared nothing for the children," she was all that mattered.

39. This conversation took place after the first hearing regarding the Salt Lake County protective order. Rajani had failed to appear at the hearing although he was in Salt Lake. He stated to his attorney that he had to returned [sic] to Australia. After the first hearing his attorney offered temporary custody of the children provided he was allowed six weeks of visitation in Australia during the summer. We rejected the offer but did consent to visitation in Utah. Rajani has not come back to Salt Lake since that time to exercise visitation. Afterwards, during a telephone conversation in June, 1999 Rajani stated that the only reason he was staying in Australia was because "the process will bring them [the children] back to him" and he would not come to Utah for visitation or any other

purpose because he was afraid of paying support and being arrested (for violation of the protective order).

40. Rajani's own statements and letters suggest that there was no settled purpose of residing in Sydney. His letter of October 10, 1998 to Florida Atlantic University states that, even though he currently resides in Australia, " . . . my sights are set elsewhere; for years now I have been seeking to return to the U.S. for professional and personal reasons (my family lives in Utah)." (See document page number 021).

41. To my father in a letter dated May 5, 1999 he states "I am trying my best, as I have for years to find employment back in the U.S. . . . I have spent the last five years applying for jobs in the U.S.". In this same letter, he promises that if I return to Australia, "I have promised to organize life differently . . . we can . . . live normally instead of living as if we were leaving the next day as we have since we arrived in Australia." (See document page numbers 032-033).

III. THE PETITIONER'S ABUSE AND CONTROL OF THE RESPONDENT HAVE CREATED AN ABSENCE OF VOLUNTARINESS, PURPOSEFUL DESIGN OR INTENT ON THE PART OF THE RESPONDENT TO MAKE AUSTRALIA THEIR HABITUAL RESIDENT

42. Because of my misgivings, as well as Rajani's own misgivings, he constantly reassured me that we would soon be able to return to the United States. He also often told the children we would soon be returning. His attitude changed on August 29, 1998 the day after he had

found out that I had bathed the children while he was away at work the previous day. He became angry and said you "can't be trusted" and, he would "have to figure out what to do about it". At that time I asked him to let me return to the United States and told him that I would file for divorce. He responded that I was "nothing but a squaw" and said he would "rather shoot [himself] in the head rather than allow you and your family to raise these little girls." During this exchange both of the girls were present. After that, on many occasions, he told me that I could "return to Moab" anytime I wanted, but never with "these children". My mother called from the U.S. within an hour or so of this conversation. I asked her to find out for me what my rights were concerning leaving Sydney with the children. Shortly before, I had already telephoned "Legal Aid" advisors in Sydney (a hotline). They had told me that they did not think Australia could exercise jurisdiction over us, as we were on temporary residence Visa's only, without permanent resident status. Also, they told me that in Australia there is a mandatory one year waiting period between filing a divorce action, and any attention from the Court. As we expected to leave long before that, I knew that obviously wasn't an option, even if Australia could exercise jurisdiction. My fear was that until Rajani decided we could leave Australia, I could do nothing but wait. Rajani knows that the most effective way to control me is to use the children as a weapon, and he knew I would never leave without them.

43. For unexplained reasons, Rajani became extremely controlling with regard to both children, and Malini, particularly. For instance, he would not permit me

to bathe or dress the children without his approval. This behavior started around Malini's second birthday, and became more pronounced over time. Ultimately, if I dressed Malini in a way that Rajani did not like he would take her into her room, change her, leaving her other clothing from closets and drawers in a heap. He exhibited the same behavior with Anjana, but to a lesser degree. He also insisted that the house be kept extraordinarily warm and that we stuff cracks with old clothing to keep out drafts. When the children and I were uncomfortable, he became angry with me and I insisted I could find another home if I disagreed. In February or March 1999, Anjana ran a fever, but still Petitioner insisted on keeping the house super warm. Anjana broke out in fever blisters on her forehead, and only then did Petitioner admit he shouldn't have insisted on such heavy clothing. Even so, he insisted windows were to remain closed to keep in the warmth. During their stay in Denmark, Mr. Kanth's control of Mrs. Kanth worsened. He altogether refused to allow Mrs. Kanth to bathe the children for long periods of time. He forced her to cover any cracks in their apartment with old clothing to keep out drafts

* * *

Motion to dismiss Protective Order). (See document page numbers 278-285).

46. He has told me to "remember my place and not act up".

47. This controlling behavior became worse in Australia. He started to physically threaten me, stating repeatedly that he would "kick my teeth in" if I bathed the girls when he forbade me to. He also started calling

me a "squaw", "Avon lady" and "low class", or an "idiot". He made these statements in front of the children. While in Australia, Mr. Kanth's controlling and abusive behavior toward Mrs. Kanth worsened. He threatened to "kick [her] teeth in" when he discovered she bathed the children without his permission. He refused to allow her to choose the children's clothing. He called her derogatory names in front of the children, such as "squaw," "Avon lady," "low class" and "idiot." He stood over here when she brushed the childrens' hair and angrily grabbed the brush from her hands if either said, "Ouch." He allowed her to leave the house only to take Malini to and from school and to buy groceries. On another occasion, Mr. Kanth threw Mrs. Kanth out of their apartment in her pajamas on a cold winter morning and refused to let her back in. (See document page numbers 203-204).

48. During our second visit to Australia Rajani also began to monitor and strictly control any money he gave to me. He never permitted me to be a signer on a joint checking account. I have had no credit card accounts, except one that I don't use because my parent [sic], not Rajani and I, have said [sic] on its balance since we left for Denmark in 1996. Rajani has credit card accounts but he only allows me to use his account to buy a specific item that he has given me permission for and then asks for the card to be returned. He gives me enough money to buy limited groceries or a specified item and insists that I give him any change. Mr. Kanth gave Mrs. Kanth no money with which to open a checking account and, because of bankruptcy he filed in their names several years earlier, she was unable to obtain a credit card.

49. Rajani also started monitoring my behavior closely while in Australia the second time. He only taught two evenings a week and the rest of the time he was at home. When he was at home I could only leave the home with his permission and for some specific reason. If I returned later than expected I was called to explain. Rajani would often fall into a "silent rage" and not speak to me for long periods of time. When I could leave I had to wait for Anjana to sleep. Rajani would only allow me to leave if Anjana was sleeping because Rajani would nap frequently throughout the day. (See document page number 195).

50. Many times I was asked to socialize with other mothers. Rajani would refuse because he insisted that I take care of Anjana.

51. In August 1998 I attempted to contact attorneys in Australia to find out what my rights were regarding leaving with the children. I was prevented from doing this because we lived in the suburbs, and the attorneys were in the city, and I had no excuse for taking such a long trip.

52. Rajani held my U.S. passport and the children's. After his wife subpoenaed his banking information in 1995, Rajani started keeping all cash in a waist pack which he either hid or kept on his person. I think he kept the passports in the waist pack as well.

53. During our first trip to Australia Rajani gave me Malini's passport in order to register her for school and he gave mine to me when I need [sic] to change some money. He asked for Malini's passport back, but not mine.

54. In January 1999 he gave me all of the passports so that I could prepare applications to go to Singapore inasmuch as his job was contingent upon us receiving Visa's. I did not return them at that point. He did not ask for them back until March 25, 1999. He claimed he needed them back to have them stamped for Australian Visa's. However, the Australian Visa stamp was good until year 2001. We had a significant disagreement March 19, 1999, and afterwards Rajani threatened to throw me out (as he had done as recently as November 1998). At that point I noticed that Rajani was looking through drawers, closets and elsewhere for the passports. Then he asked for their return March 25, 1999. (See document page numbers 027-029; 203-204).

55. After returning to Salt Lake in 1999, Karen Sasaki-Black, a Salt Lake psychiatrist whom the children and I met with subsequent to our return, noted that the girls, in separate interviews, both remembered Rajani as threatening to "cook mama's goose". (See document page number 258).

56. Because of our social isolation in Sydney, it is unlikely that anybody there would have witnessed such behavior first hand, although my mother has seen such behavior while we have resided with my parents in Utah.

IV. FACTS AND WITNESSES BEARING ON THE CHILDREN'S BEST INTERESTS ARE PREDOMINATELY SITUATED IN UTAH

57. While in Australia the children saw various doctors at the UNSW health clinic, or in the emergency room of the Prince of Wales hospital. While in Australia, the

children visited doctors for various childhood illnesses. They did not have one doctor in Australia but saw several for various illnesses.

58. The children's pediatrician is Dr. Tom Metcalf, of Salt Lake; he has been the exclusive pediatrician since the children's respective births. Dr. Metcalf has cared for the children in between visits to Denmark and Australia. He has completed physical exams of both girls before they have left for Australia and following our return.

59. Contrary to Rajani's allegation that we engaged in psychological counselling in Australia, Rajani was the only one who sought psychological counselling. Rajani refused to allow Malini to see a therapist because she would then be "labelled". Rajani instructed me to get reading references from the hospital rather than permit therapy.

60. Since I returned to Salt Lake, Rajani has sent me a book, and a complication of books and articles on the subject of "autism" which he has told me, at various points throughout the years, might be the source of Malini's "problems". (See document page numbers 149-165).

61. Since returning to Salt Lake I have secured the help of Dr. Denise Goldsmith, psychologist, who is the therapist for Malini.

62. Malini first attended preschool in Salt Lake. Upon her return from Denmark April 6, 1997, Malini attended "Cottonwood Canyon Montessori" from April through the end of the term, and through the summer term (April 21 – July 14). During this time, she also attended an art workshop sponsored by the University of

Utah. Upon our move to Australia, we enrolled Malini in a child care center in the belief that she needed time with other children. Malini was withdrawn from this child care center, referred to by the Petitioner in his Exhibit "I", because of the threat of the Meningia Coccyl out break referred to above. She attended the child care center for 10 weeks. Although she was registered for two full days per week she attended fewer hours, as she did not adjust well to being apart from me. Malini was terrified to go anywhere after learning she could contract a deadly strain of meningitis through a sneeze from an infected person. She routinely asked Mrs. Kanth if she was going to die and isolated herself from others. When she did attend school, she generally ate lunch alone. The children in her school excluded her and referred to her as "our American visitor." She did not make her first friend until the middle of the year.

63. Malini began kindergarten at "Randwick School" in Sydney in February 29, 1998 and attended only a handful of days until we left on April 6, 1998, and returned to Salt Lake City. In Salt Lake City she attended and graduated from Montessori School of Willow Creed. (See document page number 138).

64. When we returned to Sydney July 6, 1998 we attempted to enroll Malini in school in the area of Coogee where we were looking for housing. However, the vice principal of the elementary school said that they were full. I was successful in getting Malini re-enrolled in Randwick, which was in a suburb adjacent to Coogee. Originally they were not sure if they could take her, as her files had been put into storage when we had returned

to the U.S. in April, 1998. They did not believe we [sic] be returning.

65. Malini attended only three piano lessons with me in the fall of 1998. Exhibit "K" to the Petitioner's memorandum is misleading because the other lessons were missed and not attended by Malini. In any event, the duration of the lessons was less than four weeks.

66. Malini attended only one lesson with Nicholina Kuner, at the academy ballet. Exhibit "L" to the Petitioner's memorandum is misleading because it may lead to the inference that there was a longer association with the academy. Likewise, Malini joined a drama academy in its last term 1998 and attended only three lessons.

67. While in Australia we attempted to engage Malini in extra curricular activities because Malini had not made any friends in Australia. This was also the case in Denmark. Malini did not have friends over often. Malini can be said to have only two friends while we have been in Australia. Both girls visited our house infrequently, only once and twice per girl.

68. Anjana had no friends in Australia nor any significant playmate. No neighborhood child visited her any point and we were not even aware of children her age in the neighborhood.

69. Contrary to the Petitioner's allegation, Malini's performance in school was not satisfying. Malini is a gifted girl who does well in school, however she did not perform anywhere near her ability while in Australia. Malini's kindergarten teacher in Australia expressed that Malini has "experienced some difficulties adjusting to the

whole-class directions", and "often requires personal assistance." She also notes that Malini is "quietly spoken" and "quite timid and reserved". Malini often expressed to me that she felt awkward with regard to what she was told was her "American accent". (See document page numbers 143-144).

70. Malini had difficulty interpreting the Australian "accent". This was difficult for Malini inasmuch as she had qualified for a "gifted student" program. When I asked Malini about these classes her response was "I don't know. They spoke too fast for me to understand."

71. Malini experienced persistent stomachaches and headaches throughout all periods of time that she attended Randwick School in Sydney. These symptoms disappeared during school holidays and while we were in Salt Lake, and would reappear when she resumed school in Australia. She has had no such reoccurrence since we returned to Salt Lake. Since returning to Utah, Malini has become much more involved in school. She has not experienced any panic attacks and has become more extroverted, playing and associating with friends with whom she attended Preschool prior to leaving for Australia.

72. We lived in no less than seven residences while in the Sydney area. (See document page numbers 167-184).

73. In July 1997, we stayed in the Barker Lodge for 10 days before we moved to an apartment on Houston Road. After this we looked to the UNSW housing office for short term rentals. We stayed at a house on Lenthall street, in Kensington, and at an apartment on Dolphin street, on the border between Randwick and Coogee,

because they were only six and four month leases, respectively. Both were fully furnished. Additionally, we stayed in an apartment at Cowper Street because it was a short term lease. In fact, when we left Cowper Street in April, 1998 we lost a $1,120 deposit. Before staying at Lenthall Street, Rajani wanted to stay at the Grand Hotel because he felt sure that we would be returning to the United States when he heard from Duke University, and he did not want to lose another rental bond. (See document page numbers 177-179 and 167-184).

74. There was never any talk or consideration whatsoever of looking for a house to purchase or for a long term lease the entire time we stayed in Australia. During one six month period we stayed in four different homes. During the first trip to Australia we acquired a table (which Petitioner needed for class preparations), a used bed, and minimal kitchen items (many of which were also used).

75. During our second trip to Australia we did not even take possession of those items except for a baby carriage which had accidently been left behind in Australia. We rented only fully furnished premises and we acquired no additional household items or furniture whatsoever. (See document page numbers 179-184).

76. I had and have the principal responsibility for raising the children. On the few occasions when the Petitioner took the children outside he always took along a female companion. If it was not me then it would have been a young woman like Ms. Tracy Lee. Such was the case shortly after our return to Sydney. Beyond that Ms. Lee would only have visited our home on three or four

occasions. (See Rajani's Exhibit "G" attached to his memorandum).

77. Rajani would have acquaintances to the home from time to time but on a very limited basis. Peter Slezak, and Evan Jones, both referred to in the Petitioner's affidavit, were only introduced to myself and the children, and engaged in no significant discussion with him. Rohit Chopra, one of Rajani's students at UTS, visited our home once and had dinner with Rajani. (See Rajani's Exhibits "M", "N" and "O" attached to his memorandum).

78. At the very least, it is clear that Rajani does not intend to stay in Australia any longer than he has to. If his history is any help in predicting his future behavior, he will move from job to job. The only real home base that the children have ever known is Salt Lake City. (See document page numbers 235-238; 001-002; and 014-015, also 251).

V. REMOVING THE CHILDREN FROM SALT LAKE CITY AND THE CUSTODY OF THEIR MOTHER WOULD DISRUPT THEIR MOST SIGNIFICANT PARENT/CHILD BOND AND CREATE A GREAT RISK OF HARM

79. Malini has an unusually strong bond with me and her grandmother, my mother. Malini nursed until she was two and one half years old. I would characterize her emotional state as highly fragile. She is a child who has just begun to conquer many emotionally and behavioral difficulties. These difficulties and her unusually strong

dependence upon me are due, I believe, to our frequent moving abroad and our social isolation.

80. Anjana nursed until she was one and one half years old. My pregnancy with Anjana was particularly difficult. I was prescribed bed rest for almost five months. During that time Malini refused to leave me and would stay all day with me not even going outside to play unless I accompanied her.

81. Malini and Anjana are particularly close to each other. They have been each others' only friends while we have been aborad [sic].

82. I have taken the sole responsibility for the children's primary care by bathing them, feeding them, grooming them and changing diapers, dirty pants and "potty" training and so forth. I have also taken the sole responsibility to teach and train the children. I do not recall anytime when Rajani has participated in any primary care activities nor discussed with the children their feelings, fears, problems, issues of right versus wrong and moral values and so forth.

83. There has never been an occasion when Rajani has taken the children to a doctor's appointment, lessons, or other activities, or even out for an outing, unless he has accompanied me except for his visitation in April of this year.

84. Except for visitation this year neither girl had spent any significant amount of time alone with Rajani, either day or night. This means that they have not spent more than an hour or so with Rajani alone up until his visitation time.

85. Following our separation Rajani visited with the children in Salt Lake City. While they were with Rajani both children cried for hours (Rajani and Malini both called me, and Rajani reported the situation to me, which I could also hear). (Rajani told me) Anjana literally cried herself sick, throwing up and so on. Malini called and, while sobbing said "Mama you don't understand, I just need you so much . . . " She only calmed down when I told her that if she would just let herself fall asleep perhaps the next day Rajani would consider returning them. Both children have responded very emotionally to any subsequent visits by Rajani and have been very frightened. They were also frightened when my father got in Rajani's car. When Rajani visited after his overnight visitation Malini would hug me tight and say "No, don't let daddy take me again." Mr. Kanth took the children for a visit in April of 1999. He did not return the children by their bed time, as he said he would, nor did he call Mrs. Kanth. Several hours later, Mr. Kanth telephoned Mrs. Kanth to tell her he would not ever return the children. Mrs. Kanth could hear Anjana crying in the background and Malini begged, sobbing, to be returned to Mrs. Kanth. When Mr. Kanth relented and finally returned the children late that evening, Anjana's pants were soiled. Following the first visit, Mrs. Kanth had Mr. Kanth served with a protective order which provided for visitation according to state law. Approximately one week following the first visit, Mr. Kanth took the children for visitation pursuant to the protective order. Mrs. Kanth instructed him to give Anjana some Tylenol for a fever she had. He improperly gave Anjana Malini's medicine. Mr. Kanth called Mr. Kanth and let Malini speak with

Mrs. Kanth. Malini cried, "Oh, momma. You just don't know how much I need you." Anjana was crying in the background. Mr. Kanth called Mrs. Kanth a second time to tell her that Anjana cried so hard to go home that she threw up. For approximately eight weeks following, Malini cried constantly begging for reassurance that Mr. Kanth would not take her again. When he called on the phone, she told Mrs. Kanth she did not want to talk to him. When Mrs. Kanth instructed her to speak to Mr. Kanth, Malini asked him repeatedly if he would agree not to take her overnight again. The next time Mr. Kanth drove to the house, the children panicked when he stopped his car and opened his doors. They both backed away from the car. Anjana began screaming for her grandma and grandpa. Malini grabbed Mrs. Kanth and cried, "No, don't let daddy take me again."

86. Following visitation Malini had period panic and worrying attacks. She was worried that she would have to leave again. One night, during this time, I was reading a poem to Malini and we came across the word "despair". I explained the meaning of the word when Malini asked about it and she said "Mama that is what I felt like the night at daddy's." Malini is [sic] also told her psychologist and me that going with daddy would be "worse than dying".

87. During their entire lives the children have not gone to sleep at night unless they have cuddled with me, one on each side. If I even attempt to move them to the end of the bed they cry and are upset and cannot fall off asleep until I return them to their position on either side of me. They awaken many times at night and check to see if I am there. The children are both emotionally and

physically bonded with Mrs. Kanth. They have always slept in Mrs. Kanth's bed, one on each side of her. They awaken several times a night to check for her presence and panic if she does not answer or pat them. Mr. Kanth did not allow the children to feed themselves but required Mrs. Kanth to feed them. As a result, Malini has refused to eat at school because her mother is not there to feed her. The children are only now beginning to feed themselves.

88. There is no question in my mind that attachment of the children is unusual and it is for that reason that I have secured counselling for Malini with Dr. Denise Goldsmith, a Salt Lake City psychologist. The children's attachment to me is not something that I have consciously attempted to create. Rather, it has simply developed from our travels abroad during the children's young years, and the dynamics of our family relationship.

89. At Rajani's insistence I have been the primary care giver for the children they have come to rely totally upon me and perhaps to an unusual degree. It is my hope that I can help the children develop a healthy relationship with Rajani which would permit frequent visits with him so that they can establish a healthy relationship with their father and, likewise, a normal and healthy relationship with me. That is why I have sought expert help at this time.

90. In the spring of 1999, at about the time of Malini's birthday and prior to her birthday. Rajani and I had an argument in front of the children after which he demanded the return of their passports. Afterwards, on a

walk with Malini I had to explain why we needed passports. When we discussed our return to Salt Lake Malini started to cry and held me close saying "I just want to go home today, Mama. Please let's go back to Salt Lake today." I explained that would mean that she would miss her birthday party. She replied, "I can celebrate with grandma and grandpa, Taran and Anjana and you. Please mama let's go home today."

91. More recently Malini has volunteered to me the following statement: "Salt Lake City is my home, and I always looked forward to living there."

VI. THE PETITIONER'S AFFIDAVIT IS INCOMPLETE AND DESIGN [sic] TO LEAVE AN INCORRECT IMPRESSION AND GENERALLY LACKS CREDIBILITY

92. The Petitioner's affidavit is incorrect in many particulars. Half truths are stated in order to create the appearance of permanence in Australia. Specific examples are as follows.

93. The Petitioner has attempted to characterize the parties' residence in Salt Lake as less than permanent or indefinite. The parties did not just "rent" a residence. Rather, they spent four years care taking a home. (See document page number 228).

94. The Petitioner's testimony regarding the purchase of the home in Sandy does not evidence the parties' title and ownership interest in the home nor the fact that it was, indeed, our "home" in every significant sense of that term. (See document page numbers 084-090).

95. The Petitioner incorrectly characterizes our return from Australia in April 1998 as a "vacation" or "holiday". In fact, it was our definate [sic] and settled purpose to stay in Salt Lake at that time. (See document page number 189-195 and 032-033).

96. The Petitioner attempts to utilize the letter of Dr. Jan Hogan to explain our return to Salt Lake in April 1998. In fact, the letter was based upon misrepresentations of the Petitioner to Dr. Hogan in the first place. (See document page number 189).

97. Petitioner fails to indicate the limited nature of Malini's involvement in extra curricular activities. He also fails to notice Malini's participation in such activities in Utah.

98. The supporting letters attached to the Petitioner's affidavit lack a full explanation of the limited basis upon which the authors render their observation or opinion.

DATED THIS 18th day of August, 1999.

/s/ Cory Kanth
CORY LEIGH KANTH
Affiant

SUBSCRIBED AND SWORN to before me this 18 day of August, 1999.

/s/ Talisha Anne Blonquist
Notary Public
Residing in Summit
County, State of Utah

My Commission Expires:
[LOGO]

CERTIFICATE OF HAND DELIVERED

I hereby certify that a full, true and correct copy of the above and foregoing *AFFIDAVIT OF CORY LEIGH KANTH* was hand delivered, on the 18 day of August, 1999 addressed as follows:

John E. Diaz
DIAZ & ASSOCIATES
350 South 400 East, Suite 101A
Salt Lake City, Utah 84111

/s/ Talisha Anne Blonquist

(3)

Supreme Court, U.S.
FILED
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No. 00-1630

In the

United States Supreme Court

PROFESSOR RAJANI KANTH
PRO SE Petitioner/Appellant

Vs.

CORY KANTH
Respondent / Appellee

On Petition For A Writ Of Certiorari
To The United States Court Of
Appeals For The Tenth Circuit

PETITIONER'S REPLY BRIEF

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5 pp

PETITIONER'S BRIEF IN REPLY

ARGUMENT:

In her **Brief in Opposition**, to which this is the **Reply**, Respondent maintains the following principal arguments:

1. That her surreptitious abduction of the Kanth children on March 25th , 1999 from the Kanth home in Sydney, Australia was not 'wrongful' as defined under the Hague Convention against International Child Abduction in Article 3 of the Convention.
2. That the 'Intent' of the Petitioner in moving to Australia (not once but twice) on a permanent job offer was 'temporary' ,
3. That this Petitioner 'acquiesced' to the abduction , given the structure of a personal letter to Respondent's father, under a permissible defense as given by Article 13a of the Convention.

Given that Arguments 1 and 2 are the very arguments upheld by the District and Circuit Courts - and indeed form the basis of their judgments which are at issue in this Petitioner's plea for issuance of a Writ of Certiorari and under challenge, in some detail of fact and argument, in the original Petition - it would be quite superfluous to be adding further comment here.

The Petition at issue , for the Writ of Certiorari, should properly address only errors and elisions in the earlier Court judgments, not the various ad hoc and/or ancillary arguments of the Respondent. As such, in this regard, Argument#3 should not really elicit any comment here , particularly since neither the District Court nor the Circuit Court judgments lean on it in any important manner.

However, Petitioner, herewith , out of respect for process, offers a very brief critique of the 'acquiescence' charge, placing it in context of the general principles governing a Hague Convention Case(an examination of the *contents* of the letter, it will become apparent, gainsays the generous interpretive latitude that Respondent allows herself in her **Brief in Opposition**):

1. The letter in question, authored by the Petitioner, is to a *third party* (legally uninvolved in these proceedings), addressed to *Respondent's father,* not to the Respondent directly.
2. The letter is dated April 5, 1999, i.e. barely ten days or so after the abduction, authored in a state of turmoil and shock , as might be expected to prevail in a situation of a child abduction.
3. The letter was scribed, in a state of ignorance (the Hague Convention is an obscure international Treaty hardly known to lay personnel), *well before Petitioner was aware of his legal rights as per the Hague Convention.* Indeed, his Hague petition was filed only a few weeks later on May 14th, 1999.
4. Nonetheless, the letter, *at the very top of the agenda, as a primary option,* indicates that the Petitioner has a *permanent* job *in Australia;* and that Respondent could have one there, too, if she so chooses (the 'choice' was being offered to the Respondent, not to the children). In effect, the letter begins with a plea for what the Convention would understand as a *'Voluntary Return'* of the children prior initiating legal proceedings. Indeed this is in conformity with the US State Dept , the executive department administering the Convention in the US, that wrote to the Respondent in

the same time period asking for such a voluntary return.

5. It also indicates, as a scenario, subject to bilateral understanding, that Petitioner was willing to consider, but as a secondary option, a *future* return to the US.
6. At no time or place in the letter does the Petitioner suggest that he was content with any of the actions taken by the Respondent *as they pertain to the children.*
7. Similarly at no place in the letter does the Petitioner indicate that he was surrendering his legal rights *via s vis* his children, and against the Respondent, nor sanctioning their unlawful seizure by the Petitioner. As such, Petitioner was not granting the Respondent any absolution for the transgression in question.
8. A defense under Article 13 a (or Article 13 more generally) needs be established by a *preponderance of evidence* (i.e., a *single letter*, addressed to a *third party*, replete with equivocal content will not suffice: such a document needs be placed in context of *all the facts* of the case) : in effect the burden of proof on the Respondent is heavy. Even if such a decisive burden of proof were to be forthcoming from the Respondent – *and it is not* - the implication for Court is simply that they are no longer under obligation to fulfill the mandatory *duty* to order the return of children demanded by the Convention (Article 7 requires the Central Authority to take all possible steps to secure the return of the Abductees; and Article 12 requires that Orders shall be made for return of the child forthwith).This still leaves open their option (judicial discretion) to return the children in keeping with the principal aim of the Convention. Indeed, at the second Special Commission reviewing the operation of the Convention (18-21 January 1993)

> Mr.Adair Dyer (First Secretary) stressed that Article 13 counteracts the main aim of the Convention – to secure the Return of the wrongfully abducted – and ,as such, the exceptions should be used very carefully, perhaps not at all, and certainly always with great circumspection.

Given the foregoing, it is clear that, on any reasonable review of the matter, that a single letter, authored in a crisis state, prior to any information on his legal rights (the Hague Convention is a rather obscure Treaty hardly known to lay people), addressed to a third party, and quite equivocal in its content, is enough to deny the intent of the Convention or the Wrongful nature of the abduction in question, let alone deter the magistracy from their obligation to return international Abductees, in this case, to the Petitioning parent.

As such, the Respondent's **Brief in Opposition** adds little that is effective, or even relevant, to arguments previously made in the history of this case.

Respectfully,

Professor Rajani Kanth
Salt Lake City, Utah , June 4, 2001